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No. 80-1945

In the Supreme Court of the United States

October Term, 1980

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
Appellant,

vs.

DEPARTMENT OF INSURANCE, STATE OF WYOMING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Armed Forces Cooperative Insuring Association, appellant herein, prays that an order be entered noting probable jurisdiction of its appeal from a final judgment of the Supreme Court of Wyoming entered in this case by divided court December 31, 1980, and its order entered February 19, 1981, denying and overruling timely filed appellant's motion for rehearing. In event for any reason appeal is improvidently taken, appellant prays that appropriate action be taken to regard and act on this Jurisdictional Statement as a Petition for a Writ of Certiorari as provided by 28 U.S.C. Section 2103.

QUESTIONS PRESENTED

(Citations of the appropriate sections of Wyoming Insurance Code are found on p. 3 hereof and the verbatim provisions thereof are set forth in Appendix J, pp. A115 et seq. and Appendix L, p. A135).

1. Does the Wyoming Insurance Code (W.S. Ch. 26) as interpreted and construed by the Wyoming Supreme Court, District Court and Insurance Department, as being applicable to appellant which conducts all its business on the federal enclave of Fort Leavenworth, Kansas, and as allowing the Wyoming Department of Insurance to tax, penalize and regulate appellant and to send its staff members onto the federal enclave of Fort Leavenworth to supervise and regulate appellant's activities there as well as activities of senior federal military officers designated to have charge of appellant conflict with and violate the exclusive legislation, jurisdiction and authority provisions of Article I, Section 8, Cl. 17, 18 of the United States

Constitution by improperly taxing appellant and assessing a $5,000 penalty and authorizing Wyoming state officials to interfere with and supersede exclusive federal authority and go onto the federal enclave there for such purposes?

2. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed conflict with and violate the full faith and credit clause of Article IV, Section 1 of the United States Constitution by improperly taxing appellant and authorizing Wyoming state officials to tax, penalize and regulate appellant and to go onto the federal enclave to interfere with and supersede exclusive federal authority over appellant and the federal enclave ceded by Kansas to the United States, by the Kansas Cession Act of 1875, KSA 27, 101-104, and accepted by the United States, thereby failing to accord full faith and credit to the Kansas Cession Act?

3. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed to permit Wyoming to tax, penalize and regulate appellant and to send its officials onto the federal enclave to regulate activities there conflict with and violate the exclusive federal authority respecting territory or other property of the United States granted by the federal powers clause, Article IV, Section 3, Clause 2 of the Constitution of the United States, exclusive authority having been preempted over Fort Leavenworth by the United States?

4. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed to permit Wyoming to tax, penalize and regulate appellant and to send its officials onto the federal enclave to regulate activities there conflict with and violate the federal supremacy clause, Article VI, Clause 2 of the United States Constitution by improperly superimposing state authority over federal supremacy and exclusive federal jurisdiction over Fort Leavenworth?

5. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed conflict with and violate exclusive federal authority to raise and support armies, provide and maintain a navy, to regulate them and provide for the Common defense granted by Article I, Section 8, Clauses 1, 11, 12, 13, 14, 15, 17 and 18 of the United States Constitution by improperly superimposing state authority to tax, penalize and regulate operations and arrangements made with federal sanction and guidance to provide non-profit insurance protection and issue casualty insurance coverage at the federal enclave to members of the armed forces wherever stationed?

6. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed to subject appellant to state tax, penalty and regulation violate the immunity of appellant as a federally recognized non-profit military association and federal instrumentality provided in Article VI, Clause 2 of the United States Constitution as judicially interpreted? Is appellant a federal instrumentality immune from state taxation, penalties and regulation?

7. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States by improperly subjecting to tax penalty, regulation and personal jurisdiction appellant, a mail order insuring association whose sole activities, offices, business, agents and employees are at Forth Leavenworth far removed from Wyoming?

8. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed violate Clause (3) of Article I, Section 8 of the Constitution of the United States by improperly subjecting to tax, penalty and regulation appellant, a mail order insuring association whose sole offices, business,

agents and employees are at Fort Leavenworth far removed from Wyoming?

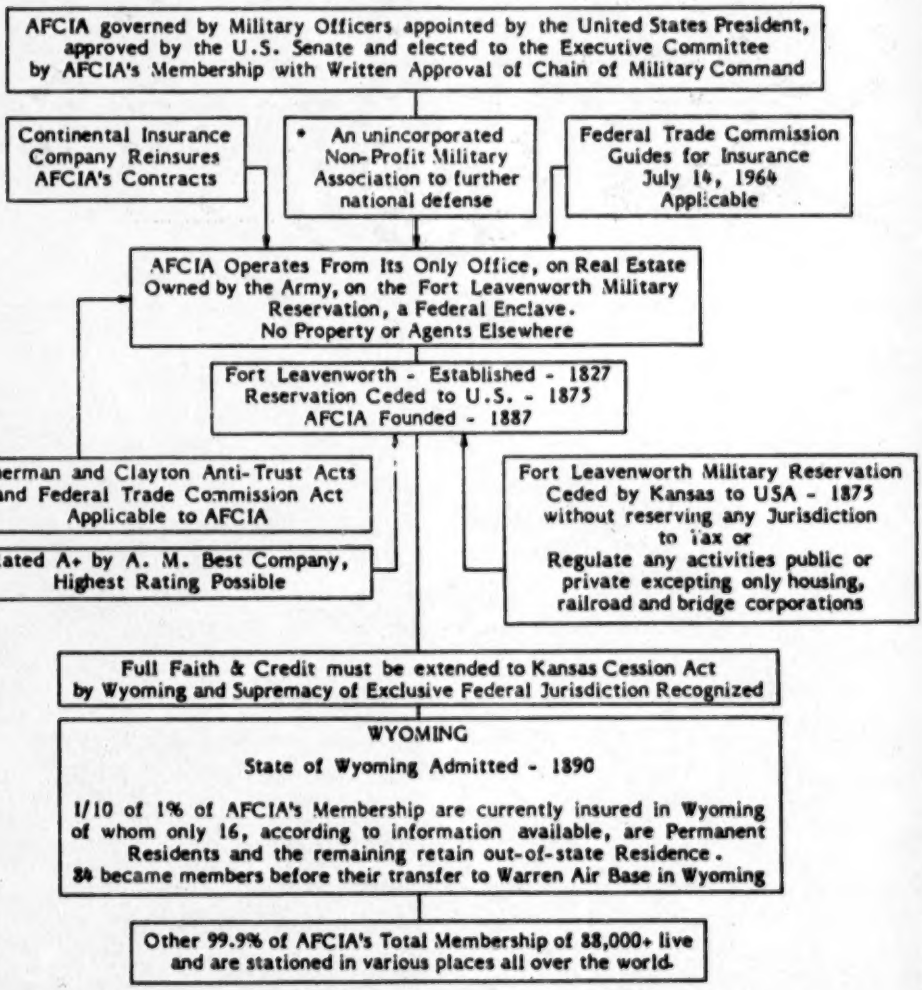
9. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed violate the due process clause and equal protection clause of the Fifth and Fourteenth Amendments to the Constitution of the United States by failing to apportion the state gross premium tax as between appellant's activities at Fort Leavenworth and alleged activities of appellant in Wyoming?

10. Does the Wyoming Insurance Code (W.S. Ch. 26) as so construed violate Clause (3) of Article I, Section 8 of the Constitution of the United States by failing to apportion the state gross premium tax as between activities at Fort Leavenworth and alleged activities of appellant in Wyoming?

11. Did appellee's request to cancel the appellant's contract of membership and insurance with Lt. Col. Aparicio instanter without hearing constitute improper impairment of contract, wrongful predecision of the case before hearing, denial of due process and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

CHART RESPECTING FEDERAL ENCLAVE
AND FEDERAL INSTRUMENTALITY 27 December 1976

HISTORY & FEDERAL CONTROL STRUCTURE



* Organized, authorized and designated by Department of the Army, Department of the Navy (to include the U.S. Marine Corps) and recognized by the Department of Defense as a Non-Profit Military Association.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of Wyoming (Appendix A, pp. A1 to A61) is reported at 622 P.2d 1380. The Decisions of the District Court of Laramie County of Wyoming and of the Wyoming Commissioner of Insurance respectively are contained in Appendix C hereto, pp. A64 to A67, and Appendix D hereto, pp. A68 to A103.

JURISDICTION

This was a proceeding initiated by appellee's filing an administrative complaint against appellant with the Wyoming Insurance Commissioner, who after administrative hearing assessed a $5,000 civil penalty and a 2 1/2% premium tax for 1975 against appellant and ordered it to desist from further collection of insurance premiums on risks located in Wyoming until it had secured a certificate of authority from appellee. On appellant's petition for review such assessment and order was sustained by the District Court of Laramie County, Wyoming, who entered judgment against appellant January 24, 1980.

The opinion and judgment of the Supreme Court of Wyoming affirming judgment of the District Court was entered December 31, 1980. Motion for rehearing timely filed by appellant was denied and overruled by order of the Supreme Court of Wyoming February 19, 1981. Notice of appeal to the Supreme Court of the United States was filed with the clerk of the Supreme Court of Wyoming on March 17, 1981, and with the District Court of Laramie County, Wyoming on March 17, 1981, copy being served on the Attorney General of Wyoming, March 16, 1981.

Jurisdiction of this Court to review the judgment below by appeal is conferred by 28 U.S.C. Section 1257 (2) and 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

(Verbatim provisions appear in Appendices H, I, J, L herein as authorized by Supreme Court Rule 15.1 f.)

Constitution of the United States: Article I, Sections 8, 10; Article IV, Sections 1, 3, 4; Article VI, Cl. 2, Fifth and Fourteenth Amendments (set out in Appendix H, pp. A110 to A112).

The Kansas Cession Act, K.S.A. Chapter 27 (set out in Appendix I, p. A13).

Wyoming Insurance Code, W.S. 1977: 26-1-110, 111 (26.1-10, 11), 26-1-115 (26.1-15), 26-2-110, 111, 112 (26.1-26, 27, 28), 26-2-116 (26.1-32), 26-2-118, 119 (26.1-34, 35), 26-2-122 (26.1-38), 26-2-125, 126, 127 (26.1-41, 42, 43), 26-3-105 (26.1-50), 26-3-109 (26.1-54), 21-3-116 (26.1-61), 26-3-118 (26.1-63), 26-3-130 (26.1-74), 26-4-103 (26.1-80), 26-32-109 (26.1-566). Note: parenthetical references are to 1976 section numbers, changed in 1977 (set out in Appendix J, pp. A115 et seq. and Appendix L, p. A135).

STATEMENT OF THE CASE

This is an appeal from decision and judgment of the Supreme Court of Wyoming affirming judgment of the District Court of Laramie County, Wyoming, entered January 24, 1980, affirming an order of the Insurance Commissioner of December 27, 1976. The Commissioner's order assessed a $5,000.00 penalty and a 2½% tax on premiums collected on Wyoming risks against appellant, Armed Forces Cooperative Insuring Association (herein "AFCIA" or the "Association") for 1975 and ordered it to desist from further collection of insurance premiums on

Wyoming risks until it had obtained a certificate of authority from the Wyoming Department of Insurance.

An administrative complaint was filed against AFCIA September 15, 1976, by the Assistant Insurance Commissioner, alleging that it was transacting insurance business within the State of Wyoming without the benefit of a certificate of authority, in violation of § 26-3-105 and § 26-32-109 (pertaining to reciprocals, not applicable) W.S. 1977, and had not paid a premium tax to Wyoming on insurance written on Wyoming risks, under § 26-4-103. Service of complaint and ten-day notice of hearing were mailed to AFCIA at Fort Leavenworth, Kansas.

At the Commissioner's request, the insurance contract of Lt. Col. Arthur J. Aparicio, Jr., was cancelled and his full year's premium returned to him under protest and without prejudice to contest such action. On October 28, 1976, AFCIA filed its Special Appearance and Motion to Dismiss on multiple grounds herein urged, overruled by the Insurance Commissioner, whereupon AFCIA filed its Special Appearance and Special Answer preserving all objections to *in personam* jurisdiction over AFCIA and the statutory and constitutional power of the Commissioner to conduct such hearing, to regulate and tax AFCIA and subject it to civil penalties. The hearing resulted in an order favoring the position of the Commissioner.

AFCIA's petition for review was duly filed and the case was heard in district court at Cheyenne, Wyoming, May 8, 1978, whereupon additional testimony and exhibits were received. Lt. Col. Arthur J. Aparicio, Jr., a member of AFCIA, appeared as Amicus Curiae by consent of the Court.

AFCIA is an unincorporated "Non-Profit Military Association" organized in 1887 at Fort Leavenworth by

the Commandant and others, now located in a million dollar office building on land owned by the Army on that United States military reservation and federal enclave, where it has its only offices, agents and employees. The Association comprises some 88,000 active and retired members of the armed services on the many military reservations around the world, some living in private homes. AFCIA is organized, authorized and designated by both the Department of the Army and Department of the Navy (including the Marine Corps) and recognized by the Department of Defense as an official "Non-Profit Military Association."

AFCIA is regulated by an Executive Committee of five senior military officers on active duty at Fort Leavenworth appointed officers by the President and confirmed by the Senate. Although elected to the committee by the membership, these officers must obtain written approval of their Commanding General at Fort Leavenworth and serve at his pleasure. The Association neither has nor maintains any office or paid employee or representative outside the boundaries of Fort Leavenworth and has no office, property, employee, representative, agent, telephone, post office box or address within the State of Wyoming.

AFCIA's members are limited to warrant and commissioned officers of the Armed Forces of the United States, for whom casualty insurance coverage is available. Applications for membership and insurance are made to AFCIA at Fort Leavenworth by mail, telephone, or personal visit, and require approval at a meeting there of the executive committee for policies to be issued.

No salesmen or agents are employed by AFCIA and no commissions are paid by it to anyone. All insurance policies are prepared and issued at Fort Leavenworth, some of which are mailed to policyholders in the State of Wyoming,

and some premium payments therefor are mailed from Wyoming to AFCIA at Fort Leavenworth, and all are acted upon there but none in Wyoming. All claims which may be allowed Wyoming insureds are paid by AFCIA to the accounts of claimants at the Army National Bank (unaffiliated with AFCIA) at Fort Leavenworth subject to withdrawal according to the pleasure and direction of the respective claimants.

Most claims are paid solely on the word of the insured, but a claimant may designate an unremunerated advisory board of not more than three members of AFCIA, or other persons eligible for membership, to examine the loss and attendant circumstances. If such persons are not available, however, claimant may obtain a statement from local fire department or other local officials and/or other disinterested witnesses, none of whom receive pay for their services. The claimant has the option of selecting and obtaining the services of a professional adjuster if he deems this necessary to the formulation and preparation of his or her claim. The foregoing are done by claimant, not AFCIA. All claims are reviewed and decided upon by the staff and Executive Committee of AFCIA at Fort Leavenworth.

There were 99 AFCIA policies in force in Wyoming, 88 of which had been issued by AFCIA before the insureds moved here. Three of the individuals who had not been insured by AFCIA before moving to Wyoming reside on the Warren Air Force Base, Cheyenne. Total premiums received by AFCIA on 1976 coverage from the aforesaid 84 persons is $9,144.16, and from the aforesaid remaining 15 persons is $1,861.54.

Furthermore, licensed insurers are required to have Wyoming insurance agents countersign all policies cover-

ing Wyoming risks and pay them their customary commission (W.S. 26-3-130).

Periodic statutory examinations of AFCIA by Wyoming officials would be made at Fort Leavenworth and they would go onto the federal enclave for such purposes.

As a member of the National Association of Insurance Commissioners (NAIC), the Wyoming Commissioner is subject to and follows uniform regulations and rules of procedure prescribed by NAIC. The Handbook, received as Appellant's Exhibit C, is utilized to ascertain compliance with the Wyoming Insurance Code. A synopsis of its provisions appears herein, pp. A129 et seq. The validity of the Code as applicable to appellant in the manner prescribed by the Handbook was raised by appellant on pages 23 to 28 of its brief filed with the Wyoming Supreme Court.

As noted by the Supreme Court of Wyoming in its opinion[1] (pp. A5-6) appellant questioned, on multiple grounds herein urged, the federal constitutional validity of applicability of the Wyoming Insurance Code to appellant and its unique situation in its pleadings filed in the administrative proceeding; also at every stage of litigation below, urging such objections not only in its pleadings but also in its briefs filed with appellee, the District Court of Laramie County and the Supreme Court of Wyoming. In each instance appellant's contentions were overruled.

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1. "On October 28, 1976, AFCIA filed its Special Appearance and Motion to Dismiss on multiple grounds herein urged. The Insurance Commissioner overruled this motion, whereupon AFCIA filed its Special Appearance and Special Answer preserving all objections to *in personam* jurisdiction over AFCIA and the statutory and constitutional power of the Commissioner to conduct such hearing and to regulate and tax AFCIA and to subject it to civil penalties."

THE QUESTIONS ARE SUBSTANTIAL

In sustaining its own state's statutes and their applicability to appellant the Court below gave lip service to this Court's pronouncements as to the scope, purpose and meaning of the various constitutional provisions in question, but proceeded to ignore their true meaning, substituting its own interpretations at variance therefrom. It also decided certain points summarily by incorrectly referring to and resting on other points circuitously in supporting its decision. Thus, for example, appellant's principal point of federal enclave immunity was "dismissed" erroneously on the basis of the Court deciding that appellant was not a federal instrumentality, wholly separate from and irrelevant to the federal enclave point, saying "We dismiss this claim with reference to our holding in the discussion of Issue No. IV that appellant is not a federal instrumentality." (p. A31). In so doing the Court below slipped into a superficial analysis of the Insurance Code and of constitutional bars to its applicability to appellant.

State officials and judges are keenly aware of current politico-socio-economic trends of the 1980's towards reversal of federal governmental growth and fiscal deficits and return of federal powers to the states along with reduction of federal appropriations to state and city governments and are consequently reluctant to relinquish tax revenues flowing to the states, lest state fiscal problems be further exacerbated. It is therefore understandable that the courts below may have found it difficult to avoid affirming the state tax by unwittingly changing federal constitutional provisions through judicial reinterpretation.

The Questions Presented are indeed so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution. Such questions are

fundamental in that they require action by this Court to prevent the lower courts herein from redefining the demarcation line between federal and state authority by incorrectly broadening state powers and reducing federal power even to the point of sanctioning the Wyoming Insurance Commissioner and his staff physically entering a federal enclave and regulating what already transpires there under federal supervision!

In overruling each and all of appellant's contentions on the federal constitutional issues presented by this appeal the courts below have misconstrued certain decisions of this Court and have totally ignored others, as hereinafter noted.

The issues presented to this Court on appeal reflect also another aspect of current politico-socio-economics involving current emphasis on American national defense and rebuilding the armed forces for adequate preparation against foreign aggression. May the State of Wyoming by imposing penalties, tax and regulation to hinder the Department of Defense in its efforts to increase and encourage voluntary enlistment and re-enlistment of competent commissioned and non-commissioned officer personnel by providing fringe benefits such as world-wide casualty insurance at cost? "Continuance and development of AFCIA has provided benefits to members of the Armed Forces, and thereby encourages such persons to remain employed in such hazardous capacity and occupation by the United States of America" (Par. 4, Agreed Statement of Facts of November 9, 1976 filed herein). Recent judicial emphasis on protection of the consumer in getting the most for his money indicates the importance of the issues herein presented and their substantial nature such as to require plenary treatment and consideration.

The foregoing constitutional "Questions Presented" may be categorized under the following areas for discussion of substantiality below: (1) federal enclave, (2) federal instrumentality, (3) mail order business, (4) failure to apportion tax, and (5) cancellation of Aparicio's contract.

First (federal enclave). Freedom from state taxation and regulation is fundamental to exclusivity of federal jurisdiction and authority over its own federal enclaves, property and activities thereon. There is no dispute that Fort Leavenworth is a federal enclave, that appellant has no office, property, agents or employees elsewhere but occupies federally owned real estate operating under federal consent and direction. This Court has repeatedly held that such circumstances give rise to immunity from state taxation or regulation. *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447 (1929); *Murray v. Joe Gerrich & Co.*, 291 U.S. 315, 54 S.Ct. 432, 433, 78 L.Ed. 821 (1934); *Humble Pipe Line Co. v. Waggoner, Sheriff*, 376 U.S. 369, 371, 84 S.Ct. 857, 11 L.Ed.2d 782 (1914); *Collins v. Yosemite Park Co.*, 304 U.S. 518, 533, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938); *Pacific Coast Dairy v. Department of Agriculture of California*, 318 U.S. 285, 294, 63 S.Ct. 628, 87 L.Ed. 761 (1942); *S.R.A. v. State of Minnesota*, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1946); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1930); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976); *Hancock v. Train*, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976).

Exclusive jurisdiction and authority over Fort Leavenworth originated with the Kansas Cession Act of 1875 (p. A113), which cession was accepted by the United States.

Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264 (1885); *Benson v. United States*, 146 U.S. 325, 331, 13 S.Ct. 60, 36 L.Ed. 991 (1892). The State of Kansas, through its insurance department, has consistently ruled that it has no jurisdiction over AFCIA and has never exercised any jurisdiction over it. Likewise, no other state, territory or possession of the United States has exercised any control over AFCIA, or imposed a tax thereon except in the instant proceeding. *In the Matter of the Appeal of Armed Forces Cooperative Insuring Association from a Decision of the Board of Tax Appeals, State of Kansas,* .....Kan. App. ....., ... P.2d ....., March 20, 1981, the Kansas Court of Appeals has recently held that no state tax may be imposed on AFCIA.

By taxing, penalizing and regulating AFCIA and by seeking to send Wyoming officials onto Fort Leavenworth to investigate, supervise and subject its activities there to state control and by requiring it under W.S. 26-3-130 to utilize Wyoming licensed resident insurance brokers to issue coverage to its members appellee would materially interfere with and usurp federal authority vested by the Constitutional provisions cited under "Questions Presented" 1 through 5: Art. I, Sec. 8, Cl. 1, 11 to 15, 17, 18; Art. IV, Sec. 1 and 3, Cl. 2; and Art. VI, Cl. 2. Furthermore by imposing the cost of premium tax, commissions to Wyoming licensed brokers, and travel, per diem allowance and other expenses of Wyoming officials going to and from Fort Leavenworth the whole purpose of the Department of Defense in providing non-profit insurance benefits to military personnel would be frustrated. The State of Wyoming would then in effect command the performance of duty of the five military colonels in charge of AFCIA, tell them how to conduct its affairs, and to that extent interfere with the national defense, violating

constitutional supremacy of federal authority over the federal enclave and refuse to accord full faith and credit to the Kansas Cession Act and immunities rights flowing therefrom.

The Court below failed to consider or address itself to the foregoing decisions of this Court uniformly holding that all business activities located on federal enclaves are totally free from state taxation and regulation. Such immunity extends in the cited cases to proprietary as well as government business and included specifically private oil and gas lessees, manufacturers and vendors of liquors, commercial dairies, construction companies, dealers in blankets, private trading posts, mobile homes, private tobacco merchants, hotels, oil companies, stevedores, fishermen, the whole gamut of private business activity. Location of these business enterprises on the enclave subjects them to exclusive federal jurisdiction, taxation and control, placing them beyond the reach of the state. The claim that state officials could enter onto the enclave to inspect, supervise, regulate and tax businesses located there is totally repugnant to federal constitutional provisions cited by appellant.

Instead of confronting such decisions of this Court and applying the law therein decided, the Court below ignored them and merely pointed out that it had decided other independent points against appellant holding (pp. A29, A30) (1) AFCIA is not a federal instrumentality, (2) AFCIA has sufficient Wyoming contacts to warrant *in personam* jurisdiction, (3) AFCIA has "submitted to" Wyoming Tax and regulation and (4) Wyoming is not attempting to regulate or tax activity beyond its borders.

Appellant's state tax and regulation immunity arising from location of all its property, agents, employees, and activities on the federal enclave is not in any manner

dependent on its status as a federal instrumentality. Federal instrumentality status gives rise to such immunity *wherever* it is located and constitutes a separate independent ground for reversal herein. Likewise whether or not AFCIA has sufficient Wyoming contacts to justify *in personam* jurisdiction has nothing whatsoever to do with either issue—in the various cases decided by this Court there were sufficient instate contacts to permit *in personam* jurisdiction but such contacts of course did not prevent immunity from state tax and regulation. And it is simply not true that the Wyoming Code does not seek to go beyond its borders to regulate and tax—it does so even to the extent of sending its state officials onto the federal enclave for that purpose (W.S. 26-2-116, 118). The Wyoming statutes say so and the NAIC Handbook (Ex. C) herein elucidates what is intended in minute detail! (See Appendix K hereto, pp. A129 et seq. It would be physically impossible for AFCIA to transport all its records, staff and executive Committee to Cheyenne.)

Finally the lower Court's incorrect comment that AFCIA submitted to such taxing and regulation possibly stems from effects in Wyoming of AFCIA's activities on the enclave resulting in the insuring of Wyoming risks of property owned by federal military personnel stationed there. In almost every instance of private commercial business activity on an enclave there are direct economic effects outside the enclave. For example, such businesses had property and employees off the enclave limits within the state and purchased or otherwise acquired merchandise and supplies off the enclave for processing, manufacture and resale. Likewise direct economic effects outside the enclave ensued from business activity on the enclave. Even the most direct of such effects have been held by this Court not to destroy immunity from location of the main activities on the enclave. Where a portion of the

business activities and employees are actually outside the enclave and within the state immunity covers the whole enterprise irrespective of crossing boundary lines. *Oil Chemical and Atomic Workers v. Mobil Oil Corporation*, 426 U.S. 407, 96 S.Ct. 2140, 2147, 48 L.Ed.2d 736 (1976); *Standard Oil Co. v. People of State of California*, 291 U.S. 242, 54 S.Ct. 381, 384, 78 L.Ed. 775 (1934); *Vincent v. General Dynamics Corporation*, 427 F. Supp. 786 (N.D. Tex. 1977).

The legal rationale for enclave private business immunity is that it is located on the enclave by invitation of the federal government and the states may not interfere with such arrangements even though a portion of the business spills over into a state or has direct economic effects there. The Court below never once came to grips with the constitutional law of federal enclaves but decided this group of questions adversely to appellant simply by referring to *other* questions wholly irrelevant to federal enclaves. Possibly the Court below in noting several decisions of this Court (not above cited) in which *both* a federal instrumentality and federal enclave were present was thereby led to the erroneous notion that only instrumentalities on enclaves have immunity when it held (p. A29) "that appellant is not a federal instrumentality; there, in seeking to regulate appellant, Wyoming is not attempting to regulate the federal government." Regulation and taxation of an enterprise on the enclave is forbidden whether or not such business is a federal instrument.

Sovereignty and authority over the enclave is exclusively federal and appellant could not lawfully have "consented" to state taxation, regulation and entry thereon by state officials for such purposes without authorization to do so from the Commanding General of the enclave or the Department of Defense. The record is barren of any such

authorization. Hence the "consent" implied by the lower Court from alleged "contacts" of appellant (p. A30) is non-existent. One can hardly imagine a more blatent intrusion on federal sovereignty than Wyoming officials entering onto the federal enclave and spending days there examining appellant's records, questioning the senior military officers on active duty charged with regulating AFCIA, exerting supervisory authority, commanding what changes should be made and reporting their findings to all 50 states and encouraging multiple taxation and regulation by them also, all as provided by the NAIC Handbook and by W.S. 26-2-116.

Second (Federal Instrumentality). The Court below held that in the absence of an Act of Congress or regulation an entity may not be a federal instrumentality and ignores action taken by the Department of the Army organizing AFCIA, actions by Departments of the Army, Navy, Marine Corps and Department of Defense itself officially recognizing appellant as a "Non-profit Military Association." Appellant was invited to conduct its activities on the federal enclave where it was assigned quarters for its operation rent free for many years and more recently valuable real estate where was built a modern multi-story brick office building, at annual token rental of $270. Furthermore, the upper echelon in the chain of military command approved in writing the service of five colonels (who had been appointed colonels by the President and confirmed by the Senate) to take complete charge and regulate appellant. There is no hint in the evidence that such actions were taken without authority or other than pursuant to authority granted by Congress or by military regulation. The Court below in effect incorrectly assumed all such actions and official recognition was unauthorized by military regulation. Furthermore, by

insisting on a specific Act of Congress, or specific regulation organizing appellant *ab initio*, the Court below overlooked that non-instrumentalities later may become instrumentalities (many state banks later became federal instrumentalities by affiliating with the Federal Reserve System, Home Owners Loan Corporation, Federal Housing Corporation and/or Federal Deposit Insurance Corporation).

Ever since initial formulation of the federal instrumentality doctrine under U.S. Const., Art. VI, Cl. 2, by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (9 Wheat) 315, 4 L.Ed. 579 (1819) this Court has been wary of elucidating a precise formula of requirements simply because an instrumentality may take any form from a corporation created by special Congressional enactment to an informal jogging club of military personnel. Each of the five colonels placed in charge of regulating appellant is himself a federal instrument. *Ohio v. Thomas*, 173 U.S. 276, 283, 19 S.Ct. 453, 43 L.Ed. 699 (1899); *Mayo v. United States*, 319 U.S. 441, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504, 147 ALR 761 (1942); *Johnson v. Maryland*, 254 U.S. 51, 57, 41 S.Ct. 16, 65 L.Ed. 126 (1920). To characterize otherwise a project of their joint effort officially sanctioned by the military arm of the federal government is a misnomer.

The Court below further overlooked that Chief Justice Marshall, in *McCulloch v. Maryland*, supra, explicitly stated that both "means" and "instruments" employed to further the ends of the federal government are immune from state taxation (pp. 409-410). Thus, a "means" as well as an "instrument" may constitute a federal instrumentality. The criteria lie not in formalities of organization, as erroneously held by the Court below (Congressional Act or specific regulation) but in federal recognition and ap-

proval of its existence as a "means" or "instrument" to further the federal government in exercise of powers delegated to it, here to provide for common defense, to provide and maintain a navy and to raise and support armies. Federal instruments of the United States have organized appellant and continued its operation under military regulation to provide for a need to enable the federal government to fulfill a part of its responsibility and since inception on a military reservation has been invited by the federal government to carry out all its activities in quarters assigned to it at Fort Leavenworth, has provided federal instruments to manage and regulate its operations for the sole benefit of the military and has granted it official recognition as an official non-profit military association to assist the Department of Defense in carrying out its mission. For the Court below to reject appellant's status on the narrow ground that it was not organized by Special Congressional enactment or by a special regulation rejects the basic rationale of Chief Justice Marshall's broad concept of "means" and "instruments" and imposes unprecedented erroneous limitation on this Court's concept and doctrine of federal instrumentalities of 183 years. The Court below overlooked the broad rule and language of this Court in *People of State of New York ex rel. Rogers v. Graves,* 299 U.S. 401, 57 S.Ct. 269, 271, 81 L.Ed. 306 (1937) that "all auxiliaries primarily designed and used to aid in its (an instrumentality's) management and operation, and which have that effect, partake of its nature."

The prohibition against state taxation, penalties and regulation is absolute "not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute". *Indian Motorcycle Co. v. United States,* 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277, 1281 (1931).

The Court below incorrectly concluded that "since appellant points to no regulations or statutes authorizing its activity, we conclude that it is not immune from state regulation, despite its intimate affiliation with the military" (p. A37). Appellant however points to Art. I, Sec. 8, of the Federal Constitution authorizing Congress to provide for common defense and to specific written recognition by the Department of Defense and of Departments of Army, Navy and Marine Corps granting appellant official status and authorizing its activities, wholly overlooked by the Court below. The question of federal instrumentality is therefore a substantial and vital issue which requires plenary consideration and decision by this Court in order to preserve separation of state and federal powers in accordance with basic constitutional delineation and requirements in the face of threatened destruction by the opinion and decision of the Court below.

Third (Mail order business). The Court below held that the Wyoming Insurance Code did not violate due process or interfere with interstate commerce because under the McCarran-Ferguson Act "it was the intent of Congress to restrict state regulation to limits imposed by a trilogy of earlier Supreme Court cases." (p. A38), that the area restricted from state control is "narrow" (p. A52), that the trilogy of this Court's decisions comprised the outer limits of freedom from state tax and supervision. *Allgeyer v. State of Louisiana,* 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897); *St. Louis Cotton Compress Company v. State of Arkansas,* 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297 (1922); *Connecticut General Life Insurance Company v. Johnson,* 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 (1938). The Court below erroneously overlooked the broad holdings of this Court (a) that "it is not the intention of Congress in the enactment of this legislation to clothe the States

with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Association Case" (holding insurance to be commerce) and (b) this Court's approval of Senator McCarran's statement that "we give to the states no more power than those they previously had and we take none from them", both in *State Board of Insurance v. Todd Shipyards,* 370 U.S. 451, 82 S.Ct. 1380, 1383, 8 L.Ed.2d 60 (1962). There this Court interpreted the trilogy much more broadly than does the Court below, holding "that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way."

In relying on *Osborn v. Ozlin,* 310 U.S. 53, 66, 60 S.Ct. 758, 84 L.Ed. 1074 (1940) and *Hoopeston Canning Company v. Cullen,* 318 U.S. 313, 63 S.Ct. 602, 87 L.Ed. 777 (1943) the Court below erroneously overlooked the fact that in *Osborn v. Ozlin* the insurer had already qualified to do business in the regulating state and in *Hoopeston* the insurer sent its agents into the regulating state periodically to examine its risks there. Likewise reliance on the early case of *Hooper v. People of State of California,* 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 197 (1895) would seem questionable in that Hooper was a California resident having offices there and mistakenly contended insurance was commerce. Furthermore the Wyoming Supreme Court failed to notice that *Travelers Health Association v. Commonwealth of Virginia,* 339 U.S. 643, 70 U.S. 927, 94 L.Ed. 1154 (1950) was brought under the Blue Sky law on the theory that the insurance certificate was a security, a concept outmoded by Code of Virginia 13.1-501(j) and in con-

flict with the federal Securities Act of 1933, 15 U.S.C. 77C(a)(8). Sales of securities are governed by a different concept of due process limitations.

The Court below erroneously pointed to allegedly distinguishing features of appellant which differentiate it from the trilogy and equate it with the cases relied on to support state regulation. These include appellant's limited advertising in military newspapers, gratis recommendations by its own military insureds who are pleased with their fringe benefit in receiving low cost coverage, the possibility of persons telephoning AFCIA on its WATS line, and in event of dispute over coverage the possibility that an *insured* could designate three other insureds or hire an adjuster to examine his claim and help him or obtain statements from local firemen or police. Mail order houses customarily advertise in national media, satisfied customers recommend them to other potential customers and are encouraged to do so, persons may telephone for information and in event a dispute should arise over a claim the customer may solicit help from local persons.

These universal features were not mentioned in the trilogy cases because advertising, telephoning and even deliveries to customers have repeatedly been held by this Court not to give rise to an instate presence of the foreign corporation such as to subject it to tax and regulation. *Norton Company v. Department of Revenue*, 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517 (1951); *Compania General de Tobacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 48 S.Ct. 100, 72 L.Ed. 177 (1927); *Miller Brothers v. State of Maryland*, 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1944); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). This Court more recently reiterated the same principles in *National Geographic Society v. Board of Equalization*, 430

U.S. 551, 559, 560 note 6, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977) pointing to "the sharp distinction between mail order sellers with retail outlets, solicitors or property within (the taxing) state, and those like *National Bellas Hess* who do no more than communicate with customers in the state by mail or common carrier as part of the general interstate business."

The actions of appellant's insureds mentioned by the Court below can have no effect in either subjecting appellant to *in personam* jurisdiction by mail summons or to taxation or regulation. *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958); *Kulko v. California Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132, 141 (1978); *World-Wide Volkswagen Corporation v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490, 501 (1980); *Rush v. Savcheck,* 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516, anno. at 853 (1980).

The Court below, while seeming to recognize that only minimal contacts are required for in personam jurisdiction but that a substantial in-state presence is required for taxation and regulation of a foreign corporation, failed to apply principles long enunciated by this Court in the foregoing cases and attempted to impute to AFCIA actions of its insureds in justifying Wyoming jurisdiction. This Court has repeatedly held that the required substantial in-state presence must arise from in-state offices, agents and property, none of which are present in Wyoming. A substantial question is indeed presented.

Fourth (unapportioned tax). The Court below committed serious errors in holding that failure of the Wyoming statute to apportion the premium tax on Wyoming risks as between Appellant's activities at Fort Leavenworth required to produce the policies and to incur the risk of loss on the one hand and alleged activities of

appellant in Wyoming on the other is immaterial and does not violate constitutional requirements of due process or equal protection of law (14th Amend.), the commerce clause (Art. I, Sec. 8) or other constitutional provisions. Initially the Court below erroneously held that the statute (W.S. 26-4-103) "has already apportioned its tax to take into account appellant's non-Wyoming activities" (p. A54). But, in the very next sentence its opinion admits that such "apportionment" results from taxing only premiums on Wyoming risks (which is not the apportionment required). Finally, the Court below admitted "Wyoming's failure to apportion the tax on Wyoming premiums to reflect out-of-state activity related to the premiums" (p. A57) but held this to be immaterial!

The opinion below relied on two cases, neither of which is controlling. *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964) although pointing out that a single factor tax based upon sales is "suspect", held that General Motors had so mingled its in-state and out-state activities to create "a maze of local connections" it was impossible to prove a burden on interstate commerce resulted. In the instant case appellant did not mingle its Fort Leavenworth activities with any alleged activities in Wyoming and consequently there could be no justification for a single factor tax.

The remaining authority cited by the Court below is *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 100 S.Ct. 1223, 445 U.S. 425, 63 L.Ed.2d 510 (1980) which sustained a tax computed on a three factor formula based upon ratios of sales, payroll and property values within Vermont as compared without. Three factor formulae have been approved in absence of more exact available ways to compute and apportion but the Wyoming statute utilizes only a single factor of sales. If the factors

of Wyoming payroll and Wyoming property of appellant had been considered (both zero) then the premium tax obviously would have been reduced by two-thirds, not a greater amount as erroneously announced by the Court below!

The Court below further erred in holding there can be no impediment to due process or interstate commerce by the unapportioned Wyoming tax on that portion of premium income from Wyoming risks attributable to work performed thereon at Fort Leavenworth because Wyoming is the only state thus far to assert a tax. The decision below thereby ignored the holdings of this Court that failure of other states to tax the same unapportioned income does not validate the tax. *Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274, 278, 91 L.Ed. 265 (1946); *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 68 S.Ct. 1260, 1266, 92 L.Ed. 1633 (1948); *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607, 82 S.Ct. 1297, 1303, 8 L.Ed.2d 720 (1962); also *Scheneman v. State Board of Tax Commissioners*, 340 N.E.2d 385, 389 (Ind. 1976). The sole reason the other states have not thus far attempted to tax appellant is their fear of illegality thereof, and if the lower court's decision is allowed to stand taxation and regulation floodgates will be opened to unlimited kinds of unapportioned taxes by fifty states on premiums, income and otherwise.

The following decisions by this court hold invalid an unapportioned single factor tax: *Standard Oil Company v. Pedi*, 342 U.S. 382, 384, 72 S.Ct. 309, 96 L.Ed. 427 (1952); *Hans Rees' Sons Inc. v. North Carolina*, 283 U.S. 123, 134-135, 51 S.Ct. 385, 75 L.Ed. 879 (1931); *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 85 S.Ct. 1156, 14 L.Ed.2d 68 (1965). A succinct statement of the principle enunciated by this Court is the following excerpt

from the opinion of the Supreme Court of Wisconsin in *National Liberty Life Insurance Co. v. Wisconsin*, 215 N.W. 2d 26, 62 Wis.2d 347 (1974), cert. den., 421 U.S. 946 (1975):

> "(4) The in-state and out-of-state activities of a mail order insurer are sufficiently separable to require apportionment. With no place of business or agents within the state there would be no 'maze of local connections' which justified a gross receipts tax. . . The premium tax is in effect a single-factor apportionment formula based solely upon receipts. Although the receipts are the result of a chain of activities beginning in the domiciliary state and ending with the capture of the premium in the risk state, the principal activities are at home. There are located the insurer's only office, all of its tangible properties and all of its employees. There is undertaken all of the study and research that leads to the writing of the policies, their form and content. There all the mortality and accident studies of an actuarial nature are made, and in effect the 'manufacture' of the insurance conducted. There the investment of premiums is made and the reserves are accumulated out of which benefits are paid. The risk state premium tax, therefore, in focusing only upon the receipt of the premium, would seem to ignore by far the bulk of the activity involved."
>
> "(5) Sec. 201.42 (11) (a), Stats., is clearly an unapportioned tax. The statute provides for a three percent tax on gross premiums; it does not provide for a tax on that portion of gross premiums attributable to activities within the state. Thus here it is not a question of approving or disapproving a particular apportionment formula. We cannot order an apportionment to save the constitutionality of the statute as it would

amount to rewriting the statute. Other Wisconsin tax statutes, most notably the income tax statutes, provide for apportionment of income directly in the statute."

In absence of a severability clause, invalidity of the tax for want of apportionment also invalidates the statutory regulatory portions justifying imposition of the tax on appellant. Failure to apportion indeed presents a substantial question requiring plenary consideration by the Supreme Court.

Fifth (Impairment of Contract): The Commissioner's request pursuant to the Wyoming Insurance Code for cancellation of Lt. Col. Aparacio's contract of membership and coverage without hearing was erroneously held by the court below as not in violation of due process and equal protection of law under the 14th Amendment or unlawful impairment of AFCIA's contract rights with him under Article I, Section 10 of the Federal Constitution because such request was not entered by formal order and therefore *Allgeyer v. State of Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897) was believed not controlling. The Aparicio membership contract had pre-existed his military transfer to Wyoming as had 87 others but he alone was singled out by appellee for cancellation. The holding that unlawful impairment of contract or violation of due process and equal protection can arise only from a formal order as distinguished from an official request is a novel and incorrect interpretation of such constitutional provisions. "Under some circumstances, a request is the same as a command and has the same meaning. A request from a person in authority is understood to be a mere euphemism." Ballentine's Law Dictionary, 3d Ed. 1969, p. 1098.

CONCLUSION

The decision of the court below is not supported by the grounds on which it rests and the Questions Presented are substantial. Appellant requests this Court to take jurisdiction of the present appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

622 P. 2d 1318

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1980

No. 5274

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
Appellant (Petitioner),

v.

DEPARTMENT OF INSURANCE, STATE OF WYOMING,
Appellee (Respondent).

Dec. 31, 1980
Rehearing Denied Feb. 19, 1981

Appeal from the District Court of Laramie County, the Honorable R. M. Forrister, Judge.

James C. Logan, of James C. Logan & Associates, Kansas City, Missouri, and Ward A. White, of Guy, Williams, White & Argeris, Cheyenne, Wyoming, for appellant.

John D. Troughton, Attorney General; Gerald A. Stack, Deputy Attorney General, Criminal Division; and Samuel A. Soule', Senior Assistant Attorney General, Cheyenne, for appellee.

Arthur A. Aparicio, Jr., Lieutenant Colonel, U.S.A.F., Amicus Curiae, and Franklin J. Smith, his attorney.

Before RAPER, C.J., McCLINTOCK, THOMAS and ROSE, JJ., and ARMSTRONG, D.J., Retired.*

ARMSTRONG, D.J., Retired, dissents without opinion.

ROSE, Justice.

PROCEDURAL BACKDROP

This is an appeal from a judgment of the district court entered January 24, 1980, affirming an order of the Insurance Commissioner entered December 27, 1976. The Commissioner's order assessed $5,000.00 and a 2½% premium tax against appellant, Armed Forces Cooperative Insuring Association (hereinafter AFCIA or the "Company" or the "Association") for 1975 and ordered it to desist from further collection of insurance premiums upon various Wyoming risks until it had obtained a certificate of authority from the Wyoming Department of Insurance.

An administrative complaint was filed against AFCIA September 15, 1976, by Merle Johnson, Assistant Insurance Commissioner, which alleged that the Company was transacting insurance business within the State of Wyoming without the benefit of a certificate of authority, in violation of § 26-3-105[1] and § 26-32-109[2], W.S.1977, and had not

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*ROONEY, J., having recused himself from participation in this case, ARMSTRONG, D.J., Retired, was assigned, having been retained in active judicial service pursuant to Article 5, Section 5, Wyoming Constitution, and Section 5-1-106(f), W.S. 1977, by order of this court entered on January 1, 1979.

1. The statute provides:

"(a) No person shall act as an insurer and no insurer shall transact insurance in this state except as authorized by a subsisting certificate of authority granted to it by the commissioner, except as to such transactions as are expressly otherwise provided in this code.

"(b) No insurer shall from offices or by personnel or facilities located in this state solicit insurance applications

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paid a premium tax to the State of Wyoming on insurance written on Wyoming risks, as required by § 26-4-103, W.S. 1977[3]. Service of the complaint and ten-day notice of the

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Footnote continued—

or otherwise transact insurance in another state or country unless it holds a subsisting certificate of authority granted to it by the commissioner authorizing it to transact the same kind or kinds of insurance in this state."

2. The statute provides:

"(a) *Issuance.*—The certificate of authority of a reciprocal insurer shall be issued to its attorney in the name of the insurer.

"(b) *Refusal, suspension, etc.*—The commissioner may refuse, suspend or revoke the certificate of authority, in addition to other grounds therefor, for failure of the attorney to comply with any provision of this code."

3. The statute provides:

"(a) *Report to commissioner.*—Each authorized insurer and each formerly authorized insurer shall file with the commissioner on or before March 1 each year a report in form as prescribed by the commissioner showing (except with respect to wet marine and transportation insurance as defined in section 26.1-89 [§ 26-5-107]) total direct premium income including policy, membership and other fees, and all other considerations for insurance and annuity contracts, whether designated as premium or otherwise, and in whatever form received by it during the next preceding calendar year on account of policies and contracts covering property, subjects, or risks located, resident, or to be performed in this state (with proper proportionate allocation of premiums or consideration as to such persons, property, subjects, or risks in this state insured or covered under policies or contracts covering persons, property, subjects, or risks located or resident in more than one (1) state), after deducting from such total direct premium income (i) the amount of return premiums on cancelled policies (but not including the return of cash surrender values on life policies or annuity contracts), (ii) the amount returned to policyholders as current dividends, and (iii) as to domestic title insurers, that portion of the premium chargeable to title search and examination services as reasonably determined by the commissioner. For good cause shown by the insurer, the commissioner may, in his discretion, extend for not over thirty (30) days the period within which such report shall be filed.

"(b) *Computation and payment of tax.*—Coincidentally with the filing of such report each such insurer shall pay

(Continued on following page)

hearing was mailed to Fort Leavenworth, Kansas, where the Association has its headquarters.

Footnote continued—

to the state treasurer through the commissioner, for the privilege of transacting business in this state, a tax upon such net premiums and net considerations, such tax to be computed thereon at the following rates:

"(i) As to foreign and alien insurers, the rate of tax shall be two and one-half percent (2½%), except as to annuity considerations, and except as provided in section 26.1-81 [§ 26-4-104];

"(ii) As to domestic insurers, the rate of tax shall be one and one-half percent (1½%) except as to annuity considerations, and except as provided in section 26.1-81 [§ 26-4-104];

"(iii) As to annuity considerations, the rate of tax shall be one percent (1%), except as provided in section 26.1-81 [§ 26-4-104].

"(c) *Tax on gross underwriting profit of wet marine and transportation insurance.*—As to wet marine and transportation insurance written in Wyoming during the preceding calendar year, on or before March 1 of each year each authorized insurer and formerly authorized insurer shall file its report with the commissioner, on forms as prescribed and furnished or accepted by him, of its gross underwriting profit on such insurance, and shall coincidentally pay to the state treasurer through the commissioner a tax of three-quarters of one percent of such gross underwriting profit. The gross underwriting profit shall be ascertained by deducting from the net premiums (i.e. gross premiums less all return premiums and premiums for reinsurance) on such wet marine and transportation insurance contracts the net losses paid (i.e. gross losses paid less salvage and recoveries on reinsurance ceded) during such calendar year under such contracts. In the case of insurers issuing participating contracts, gross underwriting profit shall not include, for computation of the tax under this subsection, the amounts refunded or paid as participating dividends by such insurers to the holders of such contracts.

"(d) *Offset for examination expenses.*—A domestic insurer may offset against taxes otherwise payable by it under this section or section 26.1-81 [§ 26-4-104], the amount paid by the insurer pursuant to section 26.1-38 [26-2-122] of this code to or with respect to the commissioner or examiners representing the state of Wyoming for any examination of the insurer made after the effective date of this code.

(Continued on following page)

At the Commissioner's request, the insurance contract of Lt. Col. Arthur J. Aparicio, Jr., Amicus Curiae, was cancelled and his full year's premium returned to him by the Association under protest and without prejudice to contest such action. There are eight other policies like the Aparicio policy presently in full force and effect in Wyoming. On October 28, 1976, AFCIA filed its Special Appearance and Motion to Dismiss on multiple grounds herein urged. The Insurance Commissioner overruled this motion, whereupon AFCIA filed its Special Appearance and Special Answer preserving all objections to *in per-*

Footnote continued—

(e) *Tax exclusive of other state taxes; preemption of state.*—

(i) Payment by an insurer of the tax as to this section required shall be in lieu of all taxes imposed by the state upon premiums or upon income, and of franchise, privilege or other taxes measured by income of the insurer.

(ii) The state hereby preempts the field of regulating, or of imposing excise, privilege, franchise, income, license, permit, registration and similar taxes, licenses and fees upon, insurers and their general agents, agents and other representatives as such; and on the intangible property of insurers or such representatives; and all political subdivisions or agencies in the state are prohibited from regulating insurers or other general agents, agents and other representatives as such, and from imposing or levying upon them any such tax, license, or fee. Except, that this provision shall not prohibit the imposition by political subdivisions of taxes upon real and tangible personal property of such insurers, general agents, agents and representatives.

(iii) The provisions of this subsection (d) [e] shall not be modified or repealed by any law of general application hereafter enacted unless expressly referred to or expressly repealed therein.

"(f) No tax shall be due or payable on account of premiums or considerations received from policies or contracts issued in connection with a pension annuity or profit-sharing plan exempt or qualified under sections 401, 403, 404, 408 or 501 of the United States Internal Revenue Code of 1954, as amended or renumbered from time to time, with respect to the tax payable in 1968 or thereafter."

sonam jurisdiction over AFCIA and the statutory and constitutional power of the Commissioner to conduct such hearing and to regulate and tax AFCIA and to subject it to civil penalties. The hearing resulted in an order favoring the position of the Commissioner.

AFCIA's petition for review was duly filed and the case was heard in district court at Cheyenne, Wyoming, May 8, 1978, whereupon additional testimony and exhibits were received. Lt. Col. Arthur J. Aparicio, Jr., a member of AFCIA, appeared as Amicus Curiae by consent of the court.

FACTS

AFCIA is an unincorporated "Non-Profit Military Association" organized in 1877, with its headquarters continuously located on the United States Military Reservation at Fort Leavenworth, Kansas, where, it contends, it has its only offices, agents[4] and employees. The Association comprises some 88,000 active and retired members of the armed services.[5] On the many military reservations around the world, AFCIA is organized, authorized and designated by both the Department of the Army and Department of the Navy (including the Marine Corps) as an official "Non-Profit Military Association." It is also recognized by the Department of Defense as a "Non-Profit Military Association."

The Association is physically headquartered on property owned by the United States, and is regulated by an executive committee of five members who are senior officers on active duty at Fort Leavenworth. Although

4. AFCIA has no paid insurance agents anywhere.

5. All members are insured worldwide at the same rates for personal property and public liability.

elected by the membership, these officers must obtain written approval of their Commanding General at Fort Leavenworth and they serve on the executive committee at his pleasure. The Association neither has nor maintains any office or paid employee or representative outside the boundaries of the Fort Leavenworth military reservation and has no office, property, employee, representative, agent, telephone, post office box or address within the State or Wyoming or within the state civil-court jurisdictions and boundaries of any other state.

AFCIA always has and does now operate as an unincorporated association, whose members are limited to the Armed Forces of the United States of America. The membership is further limited to warrant officers and commissioned officers for whom casualty insurance coverage is available. This last-mentioned insurance is available to military personnel in the three highest enlisted grades, who, however, are not eligible for membership in the Association. Applications for membership and applications for insurance are made to AFCIA at Fort Leavenworth by mail, telephone, or personal visit, and require approval at a meeting of the executive committee. AFCIA is not authorized to, nor has it issued, any capital stock.

No salesmen or agents are employed by AFCIA and no commissions are paid by it to anyone. All insurance contracts of the Association are prepared at Fort Leavenworth, some of which are mailed to policyholders in the State of Wyoming, and some premium payments therefor are mailed from Wyoming to the home office of AFCIA at Fort Leavenworth, and are acted upon there. All claims which may be allowed Wyoming insureds are paid by AFCIA to the accounts of the claimants at the Army National Bank (unaffiliated with AFCIA), Fort Leavenworth, Kansas, subject to withdrawal according to the pleasure and direction of the respective claimants.

Most claims are paid solely on the word of the insured, but a claimant who resides in Wyoming may designate an advisory board of not more than three members of AFCIA, who serve without remuneration, or other persons eligible for membership, to examine the attendant circumstances and assess the loss claimed. If such persons are not available, however, the claimant may obtain a statement from the officials of the local fire department, other local officials and/or other disinterested witnesses, none of whom receive pay for their services. The claimant has the option of selecting and obtaining the services of a professional adjuster if he deems this necessary to the formulation and preparation of his or her claim. All claims are reviewed and decided upon by the staff and Executive Committee of AFCIA at Fort Leavenworth.

AFCIA is not presently transacting new business with respect to residents and risks located in Wyoming, but it does continue collection of premiums on and the servicing of such Wyoming policies as remain in force at this time.

There are presently 99 AFCIA policies in force in Wyoming, 84 of which had been issued by AFCIA before the insureds moved here. Three of the individuals who had not been insured by AFCIA before moving to Wyoming reside on the Warren Air Force Base. Total premiums received by AFCIA on 1976 coverage from the aforesaid 84 persons is $9,144.16, and from the aforesaid remaining 15 persons is $1,861.54.

The Association does not now have, nor has it ever had, a Certificate of Authority to do insurance business in this state, and one has never been applied for.

AFCIA has never filed an annual report or paid an annual premium tax, but is willing to file its annual report voluntarily with the Wyoming Department of Insurance if so requested.

The Association has issued casualty and property insurance covering personal property situated inside the boundaries of federal military reservations, and has issued casualty and property insurance on both personal and real property outside the confines of military reservations within the boundaries of the State of Wyoming.

ISSUES

The appellant calls attention to the following issues for review:

"I. The 'confidential' actions, pre-hearing procedures taken by the Commissioner of Insurance acting in his dual capacity of Complainant by directions to his subordinates and at the same time as an Administrative Judge contravene AFCIA's basic rights and due process of law under the Federal and State Constitutions and Statutes, particularly Article I of the Wyoming Constitution and Article I and Amendment XIV of the United States Constitution, denying AFCIA an impartial hearing.

"II. The Wyoming Insurance Code is completely inapplicable to AFCIA because AFCIA is prevented by the Kansas Cession Act from complying with the Commissioner's order of December 27, 1976, to which Wyoming is required to give full faith and credit.

"III. The Federal Government has exclusive jurisdiction over AFCIA and has preempted the functions of control, regulation and taxation. The State of Wyoming is required to accord the Kansas Cession Act and arrangements with the Federal Government full faith and credit. Wyoming is required to recognize the supremacy of Federal Law including administrative decisions and arrangements made with the Department of the Army for AFCIA to be organized and

to issue at Fort Leavenworth insurance coverage to military personnel located worldwide. Wyoming may not interfere with regulation of AFCIA by senior officers of the United States on active duty.

"IV. AFCIA is immune from tax, regulation and control by the Commissioner of Insurance because it is recognized by the United States as an official Non-Profit Military Association and is a Federal instrumentality.

"V. The Commissioner's attempt to regulate AFCIA, a Mail Order Insurer, to require it to obtain a Certificate of Authority, to pay fees and premium tax and to penalize appellant $5,000 violates rights of due process guaranteed by the constitutions of the United States and Wyoming.

"VI. The Commissioner acquired no personal jurisdiction over AFCIA by which to hold a purported hearing and enter a binding order subjecting AFCIA to regulation, payment of premium taxes and levying a $5,000 civil penalty. The order of December 27, 1976, is therefore a nullity for violation of due process. Purported service of process should be quashed and the case dismissed ab initio.

"VII. Failure of the Wyoming Insurance Code to apportion the gross premiums tax between in-state and out-of-state activities violates rights of due process and equal protection and renders the imposition of tax and regulation unconstitutional if applied to Appellant. Failure of the Commissioner to rule on this vital point deprived AFCIA of a full hearing and renders the administrative proceeding and order a nullity.

"VIII. Cancellation of Aparacio's coverage instanter without a hearing and prospective cancellation of the

now remaining memberships and their coverage constitute impairment of contractual rights, wrongful predecision of the case before hearing, denial of due process and equal protection; furthermore, failure of the Commissioner to consider and rule on this basic point raised before him renders his order of December 27, 1976, a nullity.

"IX. AFCIA is exempted from any requirement of a certificate of authority by W.S. 26-3-106.

"X. The Commissioner's Decision and Actions herein disregard the rights of AFCIA's members as consumers and fail to follow the spirit of most recently developing law of Consumer Protection."

ISSUE NO. I

The appellant alleges that it did not receive a fair hearing. We spoke of fair-hearing requirements in Fallon v. Wyoming State Board of Medical Examiners, Wyo., 441 P.2d 322, 327 (1968), where we said:

> "With respect to a fair hearing, it is fundamental that principles of justice and fair play require 'an orderly proceeding appropriate to the case or adapted to its nature, just to the parties affected, and adapted to the ends to be attained, one in which a person has an opportunity to be heard, and to defend, enforce, and protect his rights before a competent and impartial tribunal legally constituted to determine the right involved; representation by counsel; [and] procedure at the hearing consistent with the essentials of a fair trial according to established rules which do not violate fundamental rights.' 2 Am.Jur.2d, Administrative Law, § 353, pp. 166-167."

We re-acknowledge and remain ever mindful of that doctrine throughout this opinion.

ALLEGED PREHEARING ERRORS

(a) *Denial of motion for continuance.*

AFCIA contends, even though otherwise competently represented, that it was error for the Commissioner to fail to grant its motion for continuance of the administrative hearing because one of its attorneys was ill. Under § 1-9-102, W.S.1977, the court "may continue any action at any stage of the proceedings. . . ."

The granting or refusing of a request for continuance is "ordinarily a matter within the sound discretion of the trial court under the circumstances of each case." Glover v. Berger, 72 Wyo. 221, 263 P.2d 498, 507 (1953). Courts have enunciated rules for continuances in varying circumstances. Where one of the party's attorneys was absent for illness, and he was also represented by other counsel, it was not improper to deny a motion for a continuance. Commercial Lumber Co. v. Ukiah Lumber Mills, 94 Cal. App.2d 215, 210 P.2d 276 (1949). The *Commercial Lumber* court said that the "plaintiff was in nowise prejudiced by not having been granted the continuance requested and there was no abuse of discretion upon the part of the trial court in refusing to grant a new trial upon that ground." *Commercial Lumber Co.*, supra, at 279. Other jurisdictions have followed suit. Whitley v. Clegg, 120 Ga. 1038, 48 S.E. 406 (1904); American Rubber Corp. v. Jolley, 260 Ala. 600, 72 S.2d 102 (1954); C. H. Robinson Co. v. Hudgins Produce Co., 138 Ark. 500, 212 S.W. 305 (1919); and Annotation: 67 A.L.R.2d, Continuances—Illness of Counsel, 497, 510.

The record in the administrative hearing reveals that the hospitalized attorney's co-counsel did a credible job in handling the issues and the witnesses involved.

(b) *Allegation That the Hearing Was Inherently Biased.*

The appellant argues that it was improper for Commissioner Langdon to be both the complainant and the judge in the Insurance Department against the appellant. Our perusal of the record indicated that Assistant Commissioner Merle Johnson, not Commissioner Langdon, was the complainant. But even if we do not distinguish between the Commissioner and his assistant in this context, we are unpersuaded that appellant should prevail.

It cannot be assumed that the Commissioner is biased simply because he sits as the hearing authority in a case brought by the agency. We said in *Fallon*, supra, 441 P.2d at 329:

> "We also start, of course, with the presumption that members of the board 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances,' United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 1004, 85 L.Ed. 1429. See also National Labor Relations Board v. Donnelly Garment Co., 330 U.S. 219, 67 S.Ct. 756, 91 L.Ed. 854. . . ."

See, also, Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

This court is not, however, unaware of the problem of which appellant complains—and we have addressed it before. See, Board of Trustees, Laramie County School District No. 1 v. Spiegel, Wyo., 549 P.2d 1161 (1976). In *Spiegel*, supra, we said that an unbiased hearing is a constitutional necessity. Sorin v. Board of Education, 39 Ohio Misc. 108, 315 N.E.2d 848, 851 (1974). We affirmed the right to a fair hearing in *Fallon*, supra; and in *Spiegel*, supra, we cited a concurring opinion from *Fallon* where it was said:

> "'In the Steward [Board of Medical Examiners v. Steward, 203 Md. 574, 102 A.2d 248] and Nemitz [New Jersey State Board of Optometrists v. Nemitz, 21 N.J.Super. 18, 90 A.2d 740] cases cited . . . recognition was given to the fact that the due process clause of constitutions guaranteeing to every person a fair hearing before a fair and impartial court applies to administrative agencies exercising judicial or quasi-judicial functions. . . .'" 549 P.2d at 1166.

In *Spiegel*, the point was concluded with this observation:

> "We have, therefore, formerly held, and I would here reaffirm, that embraced by the appellee's constitutional and statutory guarantee to a fair hearing in the administrative process, is his right to be heard before an unbiased, fair and impartial tribunal—one which is
>
> > "'free from bias and prejudice and imbued with the desire to accord to the parties equal consideration. . . .' Inland Steel Co. v. National Labor Relations Board, 7 Cir., 1940, 109 F.2d 9, 20." 549 P.2d at 1166.

It is, of course, the appellant's burden to prove impropriety on the part of the Commissioner. Forest Oil Corporation v. Davis, Wyo., 396 P.2d 832, 836 (1964); and *Spiegel* supra.

We have examined the record and cannot come to the conclusion that appellant would have us reach. We would, however, remind hearing officers everywhere, as they perform their duties throughout Wyoming, that, in view of the character of the entire administrative procedure process, where there are no independent hearing officers available, the hearing officer is in a tenuous and hugely volatile position. In such circumstances, it may seem to

contestants that the hearing officer is playing inherently inconsistent roles, inasmuch as it is he or she who authorizes the complaint—and whose lot it is to oversee the investigation and preparation of the case and who also sits in judgment of the respondent. This calls for all hearing officers to not only *be* fair and impartial but to also *act* as judicially unbiased as is humanly possible so that not only will the right to a fair hearing be preserved, but the *impression* of a fair hearing will be vividly conveyed.

(c) *Preparation by the Department's Staff and Assistant Attorney General.*

The gist of this allegation is that the Department staff: (1) interviewed witnesses in preparation for the hearing and then discarded some; and (2) failed to disclose the existence of the NAIC Examiner's Handbook.

The appellant presents no cogent argument in support of these points and—for the most part no authority. We do not, therefore, need to consider them. Merritt v. McIntyre and McIntyre Garden Center, Wyo., 613 P.2d 206, 208 (1980); Scherling v. Kilgore, Wyo., 599 P.2d 1352, 1359 (1979); and Peterson v. First National Bank of Lander, Wyo., 579 P.2d 1038, 1040 (1978). In any event, there is no prejudice shown. Pure Gas & Chemical Company v. Cook, Wyo., 526 P.2d 986, 992 (1974); Robertson v. State Highway Commission, Wyo., 450 P.2d 1003, 1005 (1969); Waters v. Trenckmann, Wyo., 503 P.2d 1187, 1192 (1972); and Booth v. Hackney, Wyo., 516 P.2d 180, 183 (1973).

(d) *Alleged use of Subpoena Power.*

AFCIA contends that the Commissioner allowed Assistant Commissioner Johnson to procure a copy of an AFCIA insurance policy issued to Lt. Col. Arthur Aparicio,

and this violated Aparicio's rights. AFCIA says that *ex parte* subpoenas are not allowed in connection with investigations unknown to the accused and are in contravention of rights of privacy.

Section 26-2-123(a), W.S.1977, empowers the Commissioner to

> ". . . administer oaths and affirmations, examine and cross-examine witnesses, receive oral and documentary evidence, subpoena witnesses, compel their attendance and testimony, and require by subpoena the production of books, papers, records, files, correspondence, documents and other evidence which he deems relevant to the inquiry."

AFCIA's argument does not take into account situations where the Department suspects a violation. The Department would not be able to proceed in an investigation absent authority to subpoena records of the suspect insurer. The appellee contends (and we agree) that there is a "duality" of subpoena power. During the investigative stage, the Department, through the Commissioner, may exercise subponea powers *ex parte* to determine whether or not a complaint should be issued. When it has been decided that a complaint should issue, the investtigative stage moves into the contested aspect of the proceeding, where the authority to subpoena stems from the Administrative Procedure Act.

(e) *Requiring AFCIA's Brief to be Filed on Sunday.*

AFCIA contends that the fact that the Commissioner required briefs to be filed on Sunday, November 14, 1976, was arbitrary and capricious. The commissioner explains that when the filing date was set, he was unware it was Sunday. Appellant cites no authority which holds that

the Commissioner is guilty of an arbitrary and capricious act and does not indicate that it has been prejudiced in any way. We will not consider the point in view of these shortcomings. *Merritt; Scherling; Peterson; Pure Gas & Chemical Company; Robertson; Waters;* and *Booth;* supra.

(f) *The Transmittal of an AFCIA Policy by an Insurance Agent to the Department.*

Appellant argues:

> "The record indicates that Assistant Commissioner Johnson received a copy of Lt. Col. McDonald's AFCIA policy from his agent in Worland, Wyoming, and when AFCIA's counsel, Miss Guy, learned of this and also learned of Col. McDonald's inability to come to Cheyenne and testify at the hearing, she sought to take his deposition so as to inquire into those circumstances and this request was refused by the Commissioner. . . Refusal to allow this deposition of a potential witness is relevant to the issue of fairness and impartiality of the administrative judge."

This is the whole of appellant's comment on this point. We will not consider this argument for the same reasons we would not consider the points sought to be made under sub(c) and (e), supra.

We might say that these shotgun-type briefs, which cite no authority for the position taken, leave much to be desired so far as this court is concerned. We are not the lawyers for the litigants. If the paid attorneys want this court's consideration, they will have to brief and cite authority for the points which they feel deserve our attention—otherwise they will receive no notice whatever.

(g) *It is Charged that Commissioner Langdon Predetermined the Issue Prior to Hearing.*

In support of this contention, the appellant cites a statement attributed to the Commissioner by appellant's counsel. Assistant Commissioner Merle Johnson testified that the following was the substance of a statement made by the Commissioner before the hearing:

> "... just as maybe he or others may have exceeded the speed limit while on the highway and violated the law, so that respondent has violated the law in connection with this, the issuance of insurance policies to persons residing in Wyoming; ..."

It is also asserted that the fair-hearing rights of the Insurance Company were jeopardized because the deputy commissioner had decided, more than two months before the hearing, that the appellant was guilty of the charged violation. It is admitted that this conclusion was relayed to the Commissioner; and it is also undisputed that the deputy commissioner had various but unidentified conversations with the Commissioner before the hearing.

In relation to the communications between the Assistant Commissioner and Commissioner Langdon before the hearing, the Amicus Curiae quotes the following from *Fallon*, supra, 441 P.2d at 329:

> "... Despite the good intentions of the members of the board to disregard the report and what the committee did, our responsibilities are clear and we think we cannot under the circumstances carry the presumptions favoring the board to the extent of holding that the members of the board could efface from their minds the improper and inflammatory extraneous matters presented to them ex parte prior to the hearing as trained, knowledgeable, and experienced finders

of fact might do, and thus impartially weigh the evidence adduced at the hearing. . . ."

The circumstances which evoked this comment from the court in *Fallon*, supra, are contained in the following from the opinion:

"There was filed instead [of a complaint] a copy of an unsworn written report which the grievance committee had previously made to the state medical society. Although that report was replete with hearsay, speculation and conjecture, we do not pass on the question of whether or not the committee properly discharged its function so far as the state medical society was concerned. What seems to have been overlooked, however, is that such committee had no legal standing so far as the board was concerned and was performing no authorized function for the board.

"Notwithstanding, *it is conceded that the board on its own initiative proceeded to review this non-juridical report relating to some eighteen patients and selected therefrom the four cases named above which were regarded by the board as 'typical' of the complainants' accusations.* It is asserted by the licensee and borne out by the record that this was done in order to complete the hearing in one day. The selected cases, by the way, were cases wherein the X-ray reports—not the X-ray films—purportedly revealed a discrepancy between the claim for payment made to Blue Shield and the medical services rendered to the named patients by the licensee. While it is suggested by the board that the notice of hearing did not confine the statutory charge to those cases, we think any reasonable interpretation of the notice is to the contrary.

"As the matter stood up to the time of the hearing, the report of the committee and the so-called bill

of particulars contained information most damaging to the licensee concerning some fifteen patients and other information extraneous to the matters to be heard. Perhaps the most prejudicial matter in the entire report was the recital of the conclusion which that committee drew from the contents of the report and submitted ex parte to the board that licensee was guilty of using false and fraudulent statements in his practice. The report also made clear that the conclusion to a large extent was predicated upon licensee's failure to appear before the committee at the time requested, which also was wholly improper, Harris v. State, 23 Wyo. 487, 153 P. 881, 888, particularly when it is considered that there was no duty upon the licensee to appear so far as the board was concerned. Besides neither the committee nor the board was entitled as a matter of right to the private records of licensee described in their notices. Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574. The harmful effect of the report was compounded when the evening before the hearing the board again reviewed all of the information that had been submitted by the complainants and sent word to counsel for the parties that it was still satisfied that 'an adequate investigation of these problems' could be had by limiting the hearing to the four patients named in the notice of the board.

"Our responsibilities bearing upon the contention of bias and prejudice on the part of the members of the board are well stated in State ex rel. Beddall v. Lonctot, 62 Wash.2d 845, 384 P.2d 877, 883-884, 97 A.L.R. 1201:

> "'* * * In our highly complex society, the usefulness of these [administrative] agencies is apparent. Their use and importance emphasizes the

necessity for their operation in a manner which will leave unblemished the faith of the American people in their government. These considerations make apt the following quotation from Inland Steel Co. v. National Labor Relation Board, 7 Cir., 109 F.2d 9 (1940), where the court said:

> " ' "The Act authorizes the Board to enter an order upon a complaint alleging unfair labor practices, only after a 'hearing.' This must mean a trial by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration. There is perhaps no more important right to which litigants are entitled than that they be given such a trial. Its impairment, ipso facto, brings the court, and administratives bodies as well, into public disrepute, and destroys the esteem and confidence which they have enjoyed so generally. Time and experience have demonstrated that the public, as well as litigants, will tolerate the honest mistakes of those who pass judgment, but not the biased acts of those who would deprive litigants of a fair and impartial trial. Foremost among the responsibilities imposed upon a reviewing court, is to make sure that this foundation of our judicial system be not undermined." 109 F.2d, p. 20.' " 441 P.2d at 328-329.

In the instant case, our review of the record indicates that the Commissioner, in response to questions about his bias, stated that, yes, he did know how his staff felt about the issues of this case, because otherwise he wouldn't be holding a hearing. In other words, there would be no hearing if the Insurance Department staff felt it did not have a case against the appellant. We discussed, supra, the

proposition which holds that merely because an individual plays both an investigative, as well as an adjudicative role, it does not necessarily follow that due process has been denied. In our judgment, the above comment of the Commissioner is not a demonstration of bias which amounts to a denial of due process. When the issue of the extent of Commissioner Langdon's bias was raised, the Commissioner offered to make himself available for voir dire, a procedure we discussed in *Spiegel,* supra. This offer was not accepted and we do not think the record establishes sufficient contact or collaboration between the Commissioner and his staff to hold that appellant was denied a fair hearing.

The statement allegedly made by the Commissioner to Assistant Commissioner Johnson, to the effect that the Commissioner had determined in advance of the hearing that appellant was guilty, was denied by the Commissioner in that he stated at the hearing that he had not made up his mind yet. The absence of the voir dire of the Commissioner makes it difficult for a reviewing court to test the Commissioner's denial that he prejudged the case against his assistant's general affirmance of an alleged statement. As said in *Spiegel,* supra, 549 P.2d at 1169:

> "There are other reasons for allowing voir dire inquiry—as was said in *Federal Home Loan Bank Board* [9 Cir., 295 F.2d 403, 408 (1961)], supra:
>
> "'. . . Evidence of bias or prejudice on the part of Board members would also be relevant for consideration by a court called upon to review a final Board order. [Citation]'"

In addition, we note that this case has turned on vigorously contested legal issues, but there appear to be no factual disputes, save the issue of the Commissioner's state of mind prior to the hearing. Any legal error that the

Commissioner may have made—for whatever reason—was subject to correction in the district court and in this court. Having reviewed the record, and since we uphold the Commissioner's legal conclusions based upon our own independent review of the law, we hold that the appellant has not demonstrated prejudice constituting error.

(h) *The Cancellation of Aparicio's Policy.*

There is no authority cited for the proposition that it was evidence of bias and prejudice for the Commissioner to cancel the Aparicio policy without a hearing. Here is what the Amicus Curiae brief says about this point:

> *"Your Amicus' Policy of Insurance With AFCIA Was Cancelled At The Request Of Commissioner Langdon's Subordinates Prior To The Hearing But No Such Request Was Made Relating To The Other Wyoming Policy Holders.*
>
> "Your amicus' policy with appellant was reluctantly forfeited by AFCIA upon demand of the Department of Insurance several weeks before the administrative hearing on November 18, 1976. . . No such demand was made with relation to the other Wyoming AFCIA policy holders but for some reason your amicus was singled out by the Commissioner. Your amicus believes such action violated his rights to fairness and due process, equal protection and impairment of his rights to contract as guaranteed by Art. 1, Sec. 35 and Sec. 6 of the Wyoming Constitution. . . ."

Appellant does not even attempt to brief this point. This does not constitute the briefing requirement by the Wyoming Rules of Appellate Procedure. Rule 5.01—Brief of the appellant—provides:

> "The brief of the appellant shall contain under appropriate headings and in the order here indicated:
>
> • • • • •

"(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, the reasons therefor, *with citations to the authorities*, statutes and parts of the record relied on;" (Emphasis supplied.)

Neither the Amicus Curiae nor the appellant have complied with Rule 5.01 (4), W.R.A.P. We will not consider the point. *Merritt; Scherling;* and *Peterson,* supra.

(i) *Nonsubmission of a Brief by the Attorney General.*

Appellant's sole argument on this point is: "The nonsubmission of any brief by the Attorney General's staff indicates he regarded no need for briefing the predecided case." Apparently, the State relied on oral argument, as evidenced by the transcript, to present its case to the Commission. This hardly proves bias on the part of the Commissioner. Since there is no authority, cited, we will not consider the point anyway.

HEARING ERRORS

(a) *Appellants Argue that it was Error for the Commissioner to rule that all Prehearing Investigations were confidential.*

In the agency hearing, the respondent sought to cross-examine a complainant witness on matters having to do with the investigation undertaken by the Department in its preparation of its case against AFCIA. The witness was asked a question—the Department's attorney objected—the Commissioner ruled that the question did not have to be answered because it pertained to the investigatory aspect of the case, which he perceived to be protected under the Administrative Procedure Act, §§ 9-4-101 to 9-4-115, W.S. 1977. In an effort to be absolutely sure of himself, the

Commissioner then called a recess and invited the respondent to make an offer of proof, which the attorney for AFCIA declined to do.

Out of this, appellant charges that the Commissioner's ruling indicated bias on his part and asserts that the inquiry of the witness into the investigatory aspects of the case was being offered to prove this bias on the part of the Commissioner.

Here is the authority which AFCIA submits to establish its point:

> "What better way is there to determine possible bias or predetermination of a case than to inquire into investigative procedures. *In the Matter of State Bank Application of Security Bank, Buffalo, Wyo., Wyo. Bank & Trust Co. of Buffalo, Wyo. v. Dwight D. Bonham, St. Bank Examiner, State of Wyoming. Security Bank of Buffalo, Wyo.* Supreme Court of Wyoming, October Term A.D. 1979, No. 5153 dealt with investigative procedures of an administrative agency without notice to the parties. Although the agency's actions were sustained on the basis of actual knowledge of the parties as to the agency's actions, Judge McClintock's dissenting remarks in the advance opinion are particularly appropriate and analogous to the instant case: 606 P.2d 296 (1980)
>
> > " 'Without attempting a lengthy analysis of the objections to permitting an administrative agency to act upon its own information, not disclosed to the contesting parties, it is my conclusion that federal and state administrative procedure acts uniformly condemn such acts.' 606 P.2d at 304."

We do not consider the above-cited case to be authority for the proposition urged by the appellant in this appeal by any stretch of the imagination. The issue in the bank case was whether or not the bank examiner, in conducting his own investigation into a new bank application, erred in not disclosing the results of the inquiry to the protestants so that they could meet and controvert the newly acquired facts if they chose. There is not a word in either the majority or dissenting opinions about obtaining the evidence in order to show the examiner's bias—the reason given for the objection to the Commissioner's refusal to hear the investigatory testimony in this case.

All this being so, we again conclude that appellant has furnished us with no relevant authority for this point and no cogent argument in its behalf. We decline to further consider it. *Merritt; Scherling;* and *Peterson,* supra.

(b) *It is Charged that the Commissioner's Staff Withheld Evidence.*

There is no cogent argument made, nor does the appellant cite authority, for this allegation. We will, therefore, not consider it. *Merritt; Scherling;* and *Peterson,* supra.

(c) *It is Alleged that the Commissioner did not Rule on Certain Aspects of the Case, i.e., the Constitutionality of the Premium-tax Statute.*

In his Findings of Fact, Conclusions of Law, Decision, and Order, the Commissioner said: ". . . [I]t seems to me that this is a question which would be more appropriately raised on appeal before a court of law." Belco Petroleum Corp. v. State Board of Equalization, Wyo., 587 P.2d 204 (1978), held that administrative agencies have no authority to determine the constitutionality of a statute.

In *Belco*, where the State Board of Equalization declined to decide the constitutionality of the tax law as it was applied by the Department of Revenue and Taxation, we said:

> ". . . We hold that an administrative agency has no authority to determine the constitutionality of a statute [Citations]. This is so whether the question is the constitutionality of the statute *per se* or the constitutionality of the statute as applied. . . ." 587 P.2d 214.

We discuss the constitutionality of the premium tax, infra.

(d) AFCIA alleges: The $5,000.00 civil penalty imposed upon appellant by the Commissioner is excessive and shows bias and prejudice. No authority is cited for this proposition and we will not consider it. *Merritt*; *Scherling*; and *Peterson*, supra.

(e) *Allegation of an Erroneous Finding by the Commissioner.*

To prove bias, he appellant argues: "The Commissioner erroneously found that the advertisement contained, 'an application for insurance,' when in fact it contained merely a brief questionnaire of interest." Regardless of whether or not the Commissioner made the technical error complained of, such error, if indeed it exists, hardly proves bias. In any case, no authority is cited and the point cannot, therefore, be seriously considered—if at all—according to authority above cited.

(f) *An Objection by Commissioner Langdon.*

Appellant argues that at one point in the hearing before Commissioner Langdon, the Commissioner objected to a question, thus revealing his bias because he was,

thereby, assuming the role of an advocate. The exchange to which appellant objects is:

> "Q. In your opinion, is Commissioner Langdon basically an honest person?
>
> "COMMISSIONER LANGDON: I object to that myself.
>
> "MR. LOGAN: I object to that question. No question has been raised about anyone's honesty. However, a very serious question has been raised about the procedure that has been followed, whether it accords the Respondent its constitutional rights.
>
> "MR. HANSCUM: I will withdraw the question."

The objected-to question was asked by the State's counsel; appellant's own counsel joined Commissioner Langdon's objection to the question. Commissioner Langdon's objection to a question, which appellant's own counsel agreed was irrelevant, does not indicate bias on the part of Commissioner Langdon.

ISSUE NO. II

Appellant alleges that it is impossible for it to comply with the requirements of the Wyoming Insurance Laws and, therefore, the holding of the Commissioner and the judgment of the court have the effect of depriving it of due process of law. Appellant argues that this is so because it is not subject to regulation either by the state within whose boundaries it is domiciled or by the Federal Government. Whether or not appellant has accurately interpreted the legal situation is irrelevant. Our legislature has the power to regulate insurance activity within the state and to impose requirements on insurance companies which wish to transact business in the state. Appellant has not presented any cogent argument or authority

for the proposition that it is not subject to Wyoming law just because another state has held the appellant *not* to be subject to *its* law or because the Company is subject to Federal regulation. We need not consider the point further. E.g., *Merritt*; *Scherling*; and *Peterson*, supra.

ISSUE NO. III

This issue is actually a medley of five arguments to the effect that federal jurisdiction of appellant is exclusive. We will consider them serially:

> "A. AFCIA's sole facility and operation is at the federal enclave of Fort Leavenworth as an official non-profit military association under sole regulatory and tax jurisdiction of the United States."

This argument is, in turn, broken into three sub-arguments:

> "1. The Kansas Cession Act of 1875 transferred exclusive jurisdiction to the United States.
>
> "2. Immunization from state regulation and taxation stems from location on the enclave.
>
> "3. Effects of enclave activity on the state do not impair immunity from state control and taxation."

These three arguments are largely repetitive of Issues Nos. IV, V and VI, infra. In our discussion of Issue No. IV, infra, we hold that appellant is not a federal instrumentality; thus, in seeking to regulate appellant, Wyoming is not attempting to regulate the federal government. In our discussion of Issues Nos. V and VI, we hold that appellant has sufficient contacts with Wyoming to justify Wyoming's assertion of *in personam* jurisdiction over the appellant. We also discuss at length appellant's contention that its relationship to Wyoming is so tenuous that

Wyoming is not justified in asserting taxing and regulatory authority over it. We conclude that under the controlling federal law, appellant has submitted itself to Wyoming's taxing and regulatory authority, despite its minimal presence in Wyoming.

The answer to appellant's argument No. III A. is that Wyoming is not attempting to regulate or tax property or activity beyond its borders; rather, Wyoming is taxing and regulating appellant's activity within the State of Wyoming. Admittedly, when considering an interstate contract, it is often a fine question as to where the contract activity transpires. However, this topic is dealt with exhaustively in our discussion of Issues Nos. V and VI.

> "B. The Federal Government is already regulating all activities of Appellant."

Appellant argues that such federal regulation as presently exists, e.g., army officers involved in running AFCIA and submission to FTC mail order regulations, preempts state regulation. Its only authority for the preemption claim is a rehash of the enclave argument. Appellant also argues that it is in excellent financial health and has been so certified by an insurance rating organization. That sort of plea for exemption from state regulation is more appropriately made to the Wyoming Legislature or to Congress; it is not a cogent argument before the Wyoming Insurance Department.

> "C. Taxation and regulation to which AFCIA would be subjected by the Wyoming Insurance Department comprise minute supervision of all AFCIA's departments, activities and executive committee of senior military officers at Fort Leavenworth and constitute unlawful interference with supervision and regulation by senior military officers of the United States and

> the conduct of activities of AFCIA authorized by the United States at the federal enclave within its sole jurisdiction, all in contravention of the full faith and credit clause (Art. IV, Sec. 1), the Supremacy Clause (Art. VI, Cl. 2) and the Federal Powers Clause (Art. IV, Sec. 3, Cl. 2) and the Federal Enclave Clause (Art. 1, Sec. 8, Cl. 17) of the United States Constitution."

We dismiss this claim with reference to our holding in the discussion of Issue No. IV that appellant is not a federal instrumentality.

> "D. The McCarran-Ferguson Act grants no authority to the State of Wyoming to tax and regulate insurance activities at Fort Leavenworth insuring risks located in Wyoming."

This argument is discussed in exhaustive detail in our discussion of Issues V and VI.

> "E. Inaction of the State of Wyoming since achieving statehood in 1890 constitutes cogent support for inapplicability of Wyoming insurance statutes to AFCIA."

This argument appears to be that the Insurance Department's prior inaction is an agency determination that it lacked jurisdiction over appellant and that the Department's own interpretations of its governing statutes are entitled to weight. However, this argument is made in the context of the issue of whether controlling federal law prevents the Department's exercise of jurisdiction. There is no purpose to be gained in deferring to implied past interpretation of federal law by a state agency. We have, instead, chosen to look to the controlling United States Supreme Court cases, analyzed in our discussions of Issues IV, V and VI.

ISSUE NO. IV

Appellant alleges that it is a federal instrumentality and as such is immune from state taxation and regulation. The gist of this argument is that its mission is to provide low-cost insurance to military personnel and thereby contribute in a small way toward making military service financially attractive, thus helping Congress in its constitutionally authorized goal of providing "for the common Defense." Article I, Section 8, United States Constitution.

While AFCIA cannot rely for its existence upon statutory authority, it argues that it is a federal instrumentality because it receives an effective subsidy from the military base at Fort Leavenworth in the form of token rent for its headquarters. Moreover, it points out that it is governed by army officers on active duty at Fort Leavenworth.

A congressionally authorized federal entity is exempt from state taxation. Chief Justice Marshall, speaking for a unanimous court, said in 1819:

> "The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. . . ." McCulloch v. State of Maryland, 17 U. S. (4 Wheat.) 316, 429, 4 L.Ed. 579 (1819).

It is also true that a federal instrumentality such as the Post Office, is exempt not only from state taxation but also from state regulation, e.g., Johnson v. Maryland, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920), in which it was held that Post Office drivers need not obtain a Maryland driver's license to drive Post Office vehicles in that

state. In that case, the Court framed the issue as "whether the State can interrupt the acts of the general government itself." *Johnson*, supra, 254 U.S. at 55.

However, appellee maintains that appellnat is not a federal instrumentality. Appellant relies on Department of En loyment v. United States, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966), a case which determined that the Red Cross is a federal instrumentality and therefore immune from an employment compensation tax sought to be imposed by Colorado. The Court said:

> ". . . Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality . . . Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department . . . Its principal officer is appointed by the President, who also appoints seven (all governmental officers) of the remaining 49 Governors. . . By statute and executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government. In

those respects in which the Red Cross differs from the usual government agency—*e.g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e.g.*, national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute." 385 U.S. at 358-360.

This case, of course, provides for a more expansive definition of state-immune federal instrumentalities than does, for example, *Johnson*, supra. It can be argued that, like the Red Cross, AFCIA appears subject to a form of federal control in that Army officers run the Company. Arguably, the exercise of this control constitutes a federal subsidy in the form of free management labor, which subsidy would correspond to the federal subsidy of the Red Cross. We concede that some would say that, like the Red Cross, appellant has a mission which might be said to be calculated to satisfy a national objective, i.e., the business of providing a fringe benefit for some of those in the military. But, unlike the Red Cross, the mission, purpose and existence of AFCIA has not been authorized by Congress. In response, appellant argues that federal instrumentalities need not be created by statute.

In Standard Oil Company of California v. Johnson, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942), the Supreme Court confronted the question of whether or not United States Army Post Exchanges were governmental instrumentalities. It was held that they were, and it was noted that Post Exchanges were originally established pursuant to War Department regulations rather than statutory directives. The Court considered this distinction of no consequence since, "authorized War Department regulations have the force of law." *Standard Oil*, supra, 316 U.S. at 484.

Although appellant does not cite this case, it does cite the later case of United States v. State Tax Commission of Mississippi, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975), for the proposition that unincorporated entities may be federal instrumentalities. While we have no quarrel with this proposition, *United States v. State Tax Commission*, supra, derives its authority from *Standard Oil* with respect to the post exchanges, and *Standard Oil* is not particularly helpful to appellant in expanding the definition of federal instrumentalities. Unlike the post exchanges in *Standard Oil*, appellant can point to no federal regulations which authorize its existence—at least it does not point us to any such authorization and we have found none.

Appellant cites us to a law review case note for the proposition that a corporation is exempt from state tax if its authorized purpose is to serve the federal government. The cited authority for that statement is Clallam County v. United States and United States Spruce Production Corporation, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328 (1923). The corporation in Clallam County was formed by the United States to produce "aeroplane lumber" for World War I, with a specific statute sanctioning its formation. Nothing in that opinion even infers support for the proposition that a corporation formed by volunteers to further a federal objective enjoys immunity from state taxation or regulation.

Appellant cites other instances of federal instrumentalities to show their broad scope, but review of the cited cases shows that the instrumentalities in question were created by statute. E.g., Kay v. United States, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed. 607 (1938); Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941); New York ex rel. Rogers v. Graves, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937); and First

Agricultural Nat. Bank v. State Tax Commission, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968).

Appellant also cites Ohio v. Thomas, 173 U.S. 276, 19 S.Ct. 453, 43 L.Ed. 699 (1899), for the proposition that individual army officers, such as those overseeing appellant, may be federal instrumentalities. In that case, appellant, an army officer, was convicted in state court for serving oleomargarine in a disabled soldier's home, in violation of state law. In reversing that conviction, the Supreme Court determined that the appellant was following a Congressional Order in serving the oleomargarine—Congress had made an appropriation for the oleomargarine—and he was immune from state law while carrying out his congressionally authorized tasks. There is an obvious difference between an army officer acting pursuant to legislation and one acting as a volunteer, even if the latter is functioning with the approval of his superiors.

An interesting state case cited by appellant is Maynard & Child, Inc., v. Shearer, Ky., 290 S.W.2d 790 (1956). In holding an officers' club to be an "instrumentality of the United States," the Kentucky Court of Appeals emphasized the military supervision and management of these clubs, a point which appellant correctly argues applies to itself as well. However, the Kentucky court also mentioned that the clubs were organized pursuant to War Department regulations; and in the same sentence in which it held the clubs federal instrumentalities, the court added these qualifications: ". . . unless the proof shows that the association of officers was not in fact an officers' club under the War Department regulations." Id., 290 S.W.2d at 794.

The task before us in examining appellant's claim that it is a federal instrumentality is to determine if the federal supremacy clause of the United States Constitution prevents Wyoming from exercising jurisdiction over appel-

lant. We think the import of the authorities discussed above is that federal immunity applies only to entities or activities authorized by Congress, either directly by statute or indirectly by appropriate federal regulations. Since appellant points to no regulations or statutes authorizing its activity, we conclude that it is not immune from state regulation, despite its intimate affiliation with the military.

ISSUES NOS. V AND VI

These issues are presented as a collection of positions to the effect that appellant has insufficient contacts with Wyoming to justify regulating, taxing or exercising *in personam* jurisdiction over it. Appellant offers the following line of argument: (1) There are insufficient contacts to justify Wyoming in exercising *in personam* jurisdiction over appellant; (2) but, in any event, the requirements which will allow a state to tax and regulate an out-of-state entity are more stringent than the requirements of *in personam* jurisdiction, and appellant's connection with the State of Wyoming does not justify it being taxed or regulated by the state.

The answers to these questions are controlled in the first instance by federal statutory and constitutional law.

OVERVIEW OF FEDERAL LAW

In 1869, the United States Supreme Court held that the business of insurance was not interstate commerce and, thus, was properly subject to regulation by the states. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1868). With the exception of certain Fourteenth Amendment restrictions, which will be discussed in detail below, the states were, through this decision, free to regulate insurance. In 1944, the Supreme Court reversed itself and held that insurance business conducted across state lines was interstate commerce. United States v. South-Eastern Un-

derwriters Association, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). This turnabout prompted Congress to enact, in the following year, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. The Act declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation and taxation of such business by the several States." Id. at § 1011. Thus, Congress delegated its newly discovered regulatory powers to the states. In 1962, the Supreme Court, in interpreting the McCarran-Ferguson Act and its legislative history, held that the Act was not an *absolute* delegation of regulatory power to the states. Instead, said the Court, it was the intent of Congress to restrict state regulation to limits imposed by a trilogy of earlier Supreme Court cases. State Board of Insurance v. Todd Shipyards, 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed.2d 620 (1962).

The trilogy, which we will discuss in considerable detail, spans the years 1897-1938 and involved due-process limitations, under then-current doctrines, upon the ability of a state to regulate and tax out-of-state insurance companies or out-of-state insurance transactions. Therefore, in deciding whether it is within Wyoming's power to assert jurisdiction over appellant under federal law, we must consider both: (1) whether, under current due-process concepts, appellant has sufficient contact with Wyoming to justify the exercise by Wyoming of jurisdiction over it; and (2) whether the interstate commerce, which is the subject of this appeal, may be regulated and taxed by Wyoming pursuant to the McCarran-Ferguson Act.

For the reasons discussed above, these two different questions will both involve some consideration of the Fourteenth Amendment to the Constitution of the United States.

Current Due-Process Consideration

Appellant has advertised the availability of its insurance in military publications subscribed to by Wyoming residents. (Department of Insurance Findings of Fact). Although some of its Wyoming policy-holders obtained their insurance before coming to Wyoming, others obtained their policies while in Wyoming. (Id.) Unlike the auto retailer and regional wholesaler in World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 100 S.Ct. 559, ... L.Ed.2d ..... (1980), who claimed that their operations were only local, appellant describes its operations in a brochure appended to its brief as "scattered around the globe." Appellant has clearly and successfully—at least until the instant case—sought to do business in Wyoming. Under the well-established "minimum contacts" test of International Shoe Company v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the United States Supreme Court had decided at least two cases involving an insurer whose contacts with the state asserting forum jurisdiction were no more intensive than Appellant's contacts with Wyoming. McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); and Travelers Health Association v. Virginia, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950). As is described in more detail in the next section, "State Authority to Tax and Regulate Appellant," we conclude that appellant has purposefully availed itself of the privileges of conducting activities within Wyoming, e.g., solicitation of Wyoming military personnel by advertisements, as well as personal solicitation by existing members of appellant organization. In Olmstead v. American Granby Co., Wyo., 565 P.2d 108 (1977), we discussed relevant United States Supreme Court cases, including Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), rehearing

denied 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 92, relied on by appellant, as well as Wyoming law, and concluded that enough of a "persistent course of conduct" or derivation of "substantial revenues from goods consumed within the State" was shown for each out-of-state defendant corporation to allow Wyoming to exercise jurisdiction. We find, for the reasons discussed, infra, that appellant's conduct within Wyoming is sufficient to allow Wyoming to exercise *in personam* jurisdiction over it.

State Authority to Tax and Regulate Appellant

Appellant correctly asserts that the requirements for a state to tax and regulate an out-of-state insurer are more stringent than those justifying the state's exercise of *in personam* jurisdiction over an out-of-state insurer. This brings us to a consideration of the trilogy of cases considered by the Supreme Court in *Todd Shipyards*, supra, as limiting the authority to tax and regulate interstate insurance within the contemplation of the McCarran-Ferguson Act.

The earliest of these three opinions, Allgeyer v. State of Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897), makes extensive reference to Hooper v. California, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 197 (1895). It is, therefore, necessary to consider *Hooper* to fully understand *Allgeyer*. *Hooper* and *Allgeyer* display many similarities, but the Supreme Court reached different results with respect to the constitutionality of the challenged state laws in the two cases. In both *Hooper* and *Allgeyer*, the prosecuting and original-forum states, California and Louisiana, respectively, had laws imposing certain requirements upon out-of-state insurers for the conduct of business within the state. Both States had statutes which were the focus of the United States Supreme Court appeals and which were

clearly calculated to discourage state residents from purchasing insurance from out-of-state insurers who had not satisfied the states' requirements for out-of-state insurers.

The challenged California law provided:

> " 'Every person who in this State procures or agrees to procure any insurance for a resident of this State from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance, is guilty of a misdemeanor.' " Section 439 of the Penal Code of California, reproduced in *Hooper*, supra, 155 U.S. at 649.

The challenged Louisiana law provided:

> ". . . That any person, firm, or corporation who shall . . . [issue insurance for or obtain insurance from] any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of $1,000. . . ." Louisiana Act No. 66 of 1894, reproduced in *Allgeyer*, supra, 165 U.S. at 579.

In *Hooper*, a California resident sought to obtain insurance from defendant-appellant Hooper, an employee of an insurance brokerage firm operating in California. Pursuant to this request, Hooper's employing firm arranged a contract of marine insurance between a California resident and a Boston firm which had not complied with the California requirements for out-of-state firms. The insurance was paid for in California. Hooper was fined $5.00 for violating the California law, reproduced above, and appealed to the United States Supreme Court.

That Court said:

> "The principle that the right of a foreign corporation to engage in business within a State other than

that of its creation, depends solely upon the will of such other State, has been long settled, . . ." 155 U.S. at 652.

The Court also said:

"The State of California has the power to exclude foreign insurance companies altogether from her territory, . . . She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. . . , and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, . . .

"In the argument at bar it was admitted that, if the contract is to be considered as made in California, then this case is governed by the foregoing principles, . . ." 155 U.S. at 655-656.

The Court then considered the role of the California insurance brokerage firm which mediated the contract of insurance between the Boston firm and the California resident. It said:

"If the contention of the plaintiff in error were admitted, the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the State, he should be considered the agent of the insured per-

sons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. . .

* * * * *

"One more contention remains to be noticed. It is said that the right of a citizen to contract for insurance for himself is guaranteed by the Fourteenth Amendment, and that, therefore, he cannot be deprived by the State of the capacity to so contract through an agent. The Fourteenth Amendment, however, does not guarantee the citizen the right to make within his State, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State, within her limits, involves a clear *non sequitur*, . . ." 155 U.S. at 658-659.

In *Allgeyer*, the defendant-appellant, Allgeyer Co., located in New Orleans, was in the business of exporting cotton overseas. It obtained an open insurance contract to protect its exports, apparently while in transit overseas, from a New York firm which had not satisfied the requirements which Louisiana imposed upon out-of-state insurance companies. Under Allgeyer's arrangement with the insurer, it would order from New Orleans a separate insurance policy for each sale; the policy would be paid for by Allgeyer and delivered to Allgeyer in New York.

The *Allgeyer* opinion begins in this manner:

> "There is no doubt of the power of the State to prohibit foreign insurance companies from doing business within its limits. The State can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with, the prohibition may be absolute...
>
> * * * * *
>
> "It is not claimed in this suit that the [New York insurer] . . . [was] doing business within the State." 165 U.S. at 583.

The Supreme Court concluded that the parties agreed the contract was made in New York. The Court then distinguished *Hooper* because in *Hooper* the contract had been made in the state asserting its regulatory power. The Court said:

> "In the case before us the contract was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made." 165 U.S. at 587.

The Court then reproduced from the *Hooper* opinion much of the language we reproduced above from 155 U.S. at 658-659. It then said:

> "We do not intend to throw any doubt upon or in the least to shake the authority of the *Hooper* case, but the facts of that case and the principle therein decided are totally different from the case before us. In this case the only act which it is claimed was a violation of the statute in question consisted in send-

ing the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

". . . In this case the company did no business within the State, and the contracts were not therein made.

"The supreme court of Louisiana says that the act of writing within that State, the letter of notification, was an act therein done to effect an insurance on property then in the State, in a marine insurance company which had not complied with its laws, and such act was, therefore, prohibited by the statute. As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that

amendment . . . is deemed to embrace the right of the citizen . . . to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." 165 U.S. at 588-589.

In the second trilogy case, St. Louis Cotton Compress Company v. State of Arkansas, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297 (1922), a corporation obtained insurance upon its Arkansas property from insurance companies not authorized to do business in Arkansas. The State of Arkansas, pursuant to its statutes, sought to tax such insurance at the rate of five percent. It was apparently accepted as true by the United States Supreme Court that the corporation contracted for and paid for the policies in its domicile in Missouri. On the authority of *Allgeyer*, the corporation challenged the imposition of this tax. Arkansas argued that in *Allgeyer* Louisiana had attempted to prohibit an insurance contract, whereas all it was trying to do was tax the contract. Justice Holmes said for the Court:

". . . But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the State to the imposition is not conclusive. [Citation.] In Louisiana the detriment was $1000. Here it is five per cent. upon the premiums—which is three per cent. more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of *Allgeyer* in that here

no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. . . ." 260 U.S. at 348-349.

In the final trilogy case, Connecticut General Life Insurance Company v. Johnson, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 (1938), Connecticut General Life Insurance Company was authorized to do business in California. In addition to conducting its business in California, Connecticut General entered into reinsurance contracts concerning California risks with other California-licensed insurance companies. California, pursuant to its laws and constitution, imposed an annual tax of 2.6% on premiums, except those reinsured. Pursuant to its case law, California sought to collect the tax on reinsured premiums from the reinsurer. Connecticut General objected to being subjected to a California tax on its reinsurance on California risks. It claimed that its reinsurance activities took place outside California and were not subject to taxation by California. The Supreme Court agreed. It said:

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General Life Insurance Co. v. Johnson, supra,* 87; cf. *Morris & Co. v. Skandinavia Insurance Co.,* 279 U.S. 405, 408. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there.

> The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection." 202 U.S. at 81.

Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074 (1940), must also be considered in understanding *Allgeyer*, supra. *Osborn* concerned the extent to which Virginia could impose requirements on Virginia risks on interstate companies authorized to do business in Virginia. The Court laid great stress on the fact that Virginia risks were peculiarly tied to Virginia. In upholding the state regulation of state risks, it said:

> "In reaching this conclusion we have been duly mindful of the cases urged upon us by appellants. In *Allgeyer v. Louisiana*, 165 U.S. 578, apart from the doubts that have been cast upon the opinion in that case, the state attempted to penalize the making of contracts by its residents outside its borders with companies which had never subjected themselves to local control. Thus the statute was thought to be directed not at the regulation of insurance within the state, but at the making of contracts without. . . ." 310 U.S. at 66-67.

This line of thought was developed more fully in Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 63 S.Ct. 602, 87 L.Ed. 777 (1943). *Hoopeston*, as does the present case, involved a sort of insurance cooperative. The cooperative effort in *Hoopeston* involved inter-insurance or reciprocal insurance, which the Court defined as " 'that system of insurance whereby several individuals, partnerships and corporations underwrite each other's risks against loss by fire or other hazard, through an attorney in fact, common to all, under an agreement that each underwriter acts separately and severally, and not jointly with the other.' " 318 U.S. at 314-315, fn. 1, citing 58 Central L.J. 323.

"[T]he subscriber thus becomes the insurer and the insured." 318 U.S. at 317.

The issue in *Hoopeston* was whether such reciprocal insurance associations, "whose attorneys in fact are located in Illinois, may constitutionally be made subject to the laws of New York as a condition of insuring property in that state." 318 U.S. at 315.

The facts in the case were such that the contract was always made in Illinois, and it appears that the administration of the association was there.

In answering the issue affirmatively, the Court said:

> "In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. [Footnote reference to *Allgeyer*] More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. . . ." 318 U.S. at 316.

The Court further said:

> "The intimacy of the relation of these insurance contracts to the state of New York becomes even more apparent when it is remembered that the property insured is in the state of New York. . . ." 318 U.S. at 318.

In arriving at its conclusion the *Hoopeston* Court said:

> "The appellants draw counter conclusions from *Allgeyer v. Louisiana,* 165 U.S. 578, and the cases which follow it. While the wisdom of the *Allgeyer* case has occasionally been doubted, it is in any case clearly distinguishable here. In that case, no act was

done in the state of Louisiana except that of mailing a letter advising the insurance company of a shipment of goods, the goods themselves were in the state only temporarily, and the insurance company never purported to do business in the state. In the instant case, the reciprocals have the many actual contacts with the New York subscribers and the New York property outlined above, much of the insurance covers permanent immovables, and the reciprocals have been licensed to do business there for years. The *Allgeyer* and subsequent insurance cases have been recently considered in *Griffin v. McCoach, supra,* at 506, 507, and in *Osborn v. Ozlin,* 310 U.S. 53, 66; as the analysis in those opinions clearly indicates, the *Allgeyer* line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in the state, and there are many points of contact between the insurer and the property in the state." 318 U.S. at 318-319.

And, in the post-McCarran-Ferguson Act case of *Travelers Health Association,* supra, the Court was also confronted with a mail-order insurer who did not have a physical presence in Virginia. That state imposed upon the insurer the requirement that it cease doing business within the state until it agreed to have the Secretary of the Commonwealth accept service of process by state claimants. In upholding the Virginia regulation in the post-McCarran-Ferguson Act case, the Supreme Court said:

"In *Osborn v. Ozlin,* 310 U.S. 53, 62, we recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the 'state action may have repercussions beyond state lines. . . .' And in *Hoopeston Canning Co. v. Cullen,*

318 U.S. 313, 316, we rejected the contention, based on the *Benn* case among others, that a state's power to regulate must be determined by a 'conceptualistic discussion of theories of the place of contracting or of performance.' Instead we accorded 'great weight' to the 'consequences' of the contractual obligations in the state where the insured resided and the 'degree of interest' that state had in seeing that those obligations were faithfully carried out. . . ." 339 U.S. at 647-648.

It is finally time to consider the facts of *Todd Shipyards*, supra. In that case the Court held invalid a Texas tax on "premiums paid out-of-state on out-of-state contracts." 370 U.S. at 453. The Court characterized the facts as these:

"The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.

"The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insured transactions is the fact that the property covered by the insurance is physically located in Texas." 370 U.S. at 454-455.

In discussing its past decisions, the Court said:

> "Prior to the *South-Eastern Underwriters* decision, we had given broad scope to local regulation of the insurance business. *Osborn v. Ozlin,* 310 U.S. 53; *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313...
>
> "Here, unlike the *Osborn* and *Hoopeston* cases, the insurance companies carry on no activities within the State of Texas...." 370 U.S. at 452-453.

From the Court's refusal in *Todd Shipyards,* supra, to repudiate *Osborn* and *Hoopeston,* it is apparent that its holding that the McCarran-Ferguson Act incorporated *Allgeyer; St. Louis Cotton Compress;* and *Connecticut General,* supra, is a narrow one. The trilogy of cases just recited was given a narrow construction in subsequent cases and this narrow interpretation was emphasized in *Todd Shipyards,* even while the trilogy was deemed to have legislative significance and rescued from earlier hints that the trilogy was obsolete.

Appellant insures 99 Wyoming residents. The instant case arose when a Wyoming mortgage-lender sought a determination of whether appellant's insurance on a Wyoming residence would be legal. Appellant advertises the availability of its insurance in military publications which are subscribed to in Wyoming. In addition, according to appellant's own publication, attached to its appellate brief, members are urged to solicit new members. Indeed, at the Insurance Department hearing, a non-commissioned Air Force officer stationed in Wyoming testified that he bought an AFCIA policy after being encouraged to phone AFCIA's toll-free number by a fellow sergeant. As mentioned, appellant describes itself as a global organization.

In addition, the claims procedure, under the findings of fact of the Insurance Department, suggests considerable

activity by the appellant in Wyoming. The Insurance Department found:

> ". . . If there is any dispute as to coverage or the amount owing on the claim, the insured may designate an advisory board of not more than three members of AFCIA, who serve without remuneration, to examine the validity of the claim. If such persons are not available, the claimant may obtain statements from local police or firemen who may have investigated the loss, or he may obtain statements from disinterested witnesses and submit these directly to AFCIA. The claimant may also select and obtain the services of a professional adjuster, at AFCIA's expense, to formulate and prepare his claim if necessary. . . ." Paragraph 8, pp. 6-7 of Findings of Fact.

These facts distinguish and remove the instant case from the *Allgeyer; St. Louis Cotton Compress;* and *Connecticut General* trilogy, supra, and are more closely allied with the *Osborn; Hoopeston;* and *Travelers Health,* supra, line of cases. Appellant-AFCIA clearly solicits business from Wyoming residents by advertising in national publications, and by urging its members in Wyoming and elsewhere to enlist new members—facts either not present or not recognized in any of the trilogy cases. In addition, the claims procedure—a hugely important aspect of any insurance business—contemplates the utilization of AFCIA members in the Wyoming claims-investigating process; and, further, the claims process envisions the hiring of investigators in Wyoming. Both of these essential insurance functions constitute examples of AFCIA activity within the state far beyond the insurance company activities reported in any of the trilogy cases.

Indeed, similar conclusions were reached by the Wisconsin and California Supreme Courts with respect to

out-of-state mail order insurers in post-*Todd Shipyards* decisions. People v. United National Life Insurance Company, 58 Cal.Rptr. 599, 427 P.2d 199 (1967); and Ministers Life and Casualty Union v. Haase, 30 Wis.2d 339, 141 N.W.2d 287 (1966), appeal dismissed 385 U.S. 205, 87 S.Ct. 407, 17 L.Ed.2d 301, reh.den. 385 U.S. 1033, 87 S.Ct. 739, ... L.Ed.2d .....

ISSUE NO. VII

Appellant argues:

> "Failure of the Wyoming Insurance Code to apportion the gross premiums tax between in-state and out-of-state activities violates rights of due process and equal protection and renders the imposition of tax and regulation unconstitutional if applied to Appellant. Failure of the Commissioner to rule on this vital point deprived AFCIA of a full hearing and renders the administrative proceeding and order a nullity."

Appellant takes issue with Wyoming's practice of levying its tax on appellant's net Wyoming sales. AFCIA argues that Wyoming is constitutionally required to recognize that much or most of the activity connected with the Wyoming policies occurs outside of Wyoming at appellant's home office and that Wyoming, therefore, must not impose a tax on that portion of a Wyoming premium which represents out-of-state activity.

This argument overlooks the fact that Wyoming has already apportioned its tax on appellant to take into account appellant's non-Wyoming activities. Only appellant's Wyoming premiums are taxed by Wyoming. If Wyoming imposed a corporate income tax, it is entirely possible that Wyoming could constitutionally reach even more than it already has. See, for example, Mobil Oil

Corporation v. Commissioner of Taxes of Vermont, 100 S.Ct. 1223, ... U.S. ....., ... L.Ed.2d ..... (1980). In that case, the Supreme Court upheld, against a constitutional challenge, Vermont's imposition of an income tax upon a portion of Mobil's earnings from foreign affiliates and subsidiaries. Vermont claimed the right to tax a certain fraction of Mobil's total federal taxable income. That fraction was "the arithmetic average of the ratios of sales, payroll, and property values within Vermont to those of the corporation as a whole." 100 S.Ct. at 1227. Mobil did not appeal the fairness of the Vermont apportionment formula; instead it argued that it did not conduct its foreign operations from Vermont and that Vermont was not constitutionally privileged to tax its foreign operations. The fact that the Supreme Court held it proper for Vermont to tax these foreign earnings by virtue of Mobil's conduct of business within the state undercuts appellant's claim that Wyoming must refrain from imposing a tax on the full value of appellant's Wyoming premiums because some of the work relating to the premiums is done without the state.

In General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), Washington imposed a tax upon a certain General Motors Division. The tax was based on GM's gross wholesale sales of motor vehicles, parts and accessories delivered in the state. GM challenged the tax on the grounds that because it was levied on unapportioned gross receipts from sales, it was a tax on the privilege of engaging in interstate commerce, was inherently discriminatory, resulted in the imposition of a multiple tax burden and was a deprivation of property without due process of law. The Court began its opinion with a statement of general principles:

> "We start with the proposition that '[i]t was not the purpose of the commerce clause to relieve

those engaged in interstate commerce from their share of state tax burden even though it increases the cost of doing business.' *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). . . ." 377 U.S. at 439.

The Court then said:

"However, local taxes measured by gross receipts from interstate commerce have not always fared as well. Because every State has equal rights when taxing the commerce it touches, there exists the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce. [Citations] Such burdens would destroy interstate commerce and encourage the re-erection of those trade barriers which made the Commerce Clause necessary. [Citation] And in this connection, we have specifically held that interstate commerce cannot be subjected to the burden of 'multiple taxation.' [Citation] Nevertheless, as we have seen, it is well established that taxation measured by gross receipts is constitutionally proper if it is fairly apportioned.

"A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State,

> we look to the taxpayer's business activities within the state, *i.e.*, the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities. As was said in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'" 377 U.S. at 440-441.

We think that a tax imposed by Wyoming on gross Wyoming premium receipts is constitutionally fair. The Wyoming insurance premiums bear a special and obvious relationship to Wyoming. The cost of the insurance to appellant inurer will naturally depend on the occurrence or non-occurrence of disasters or mishaps in Wyoming. The frequency of such disasters or mishaps will, in part, be determined by the efforts of Wyoming in preventing them. In short, appellant's profit and loss experience in Wyoming will depend on the protections which Wyoming affords appellant's Wyoming insureds. In addition, the lesson to be learned from the *General Motors* case is that the chief consideration in determining the extent of a state's taxing power over an interstate corporation is the necessity to avoid multiple taxation. In *General Motors* the Court stated that the appellant corporation had not shown how its claims of multiple taxation placed a burden on interstate commerce in the constitutional sense. 377 U.S. at 449. The Court, therefore, refused to pass on the claim of multiple taxation. In our case, there is no claim that any other state seeks to tax appellant's Wyoming premiums, and appellant has not shown how the tax Wyoming has imposed on it—the same tax it seeks to impose on any other underwriter of Wyoming premiums—burdens interstate commerce.

We hold that Wyoming's failure to apportion the tax on Wyoming premiums to reflect out-of-state activity re-

lated to the premiums does not violate the federal constitution.

Appellant includes in this issue an argument that the Insurance Department's failure to rule on this issue invalidates its decision. This contention was answered in our discussion of Issue No. I, where appellant makes the same argument.

ISSUE NO. VIII

Appellant's eighth argument is:

> "Cancellation of Aparacio's coverage instanter without a hearing and prospective cancellation of the now remaining memberships and their coverage constitute impairment of contractual rights, wrongful predecision of the case before hearing, denial of due process and equal protection; furthermore, failure of the Commissioner to consider and rule on this basic point raised before him renders his order of December 27, 1976, a nullity."

This issue and its argument section is sort of a second try at some of the issues raised by appellant in its Issue No. I.

Having spent a fair amount of time treating the various issues raised by appellant in its Issue No. I section, we now review the argument of its Issue No. VIII to see if any material in this latter section compels us to change our minds about our disposition of Issue No. I. It is apparent from both the decision letter of the district court and appellant's brief that the Commissioner "requested" cancellation of the policy. According to appellant's statement of the facts, appellant complied with this request, albeit under protest. Appellant has not presented us authority or cogent argument for the proposition that the Commissioner's "request" was an impairment of con-

tract, nor has appellant pointed us to facts which would lead us to conclude that the request was, in fact, an order. The Amicus Curiae's brief refers to the cancellation as having been ordered, but does not refer us to appropriate citations in the record as required by Rule 5.01(3), W.R.A.P. Therefore, we need not consider the point further. Dechert v. Christopulos, Wyo., 604 P.2d 1039, 1044 (1980).

Appellant's argument under this issue also discusses *Allgeyer* and *Todd Shipyards*, supra, cases we have discussed extensively in our discussion of Issues Nos. V and VI.

ISSUE NO. IX

"AFCIA is exempted from any requirement of a certificate of authority by W.S. 26-3-106."

Appellant cites § 26-3-106(b), W.S.1977, which provides:

> "(b) *Insurer not transacting new business.*—An insurer not transacting new business in Wyoming but continuing collection of premiums on and servicing of policies remaining in force as to residents of or risks located in Wyoming, is transacting insurance in Wyoming for the purpose of premium tax requirements only and is not required to have a certificate of authority therefor. This subsection shall not apply to insurers which have withdrawn from Wyoming prior to May 21, 1955."

In an "Agreed Statement of Facts," it is stipulated that the appellant is now not accepting new policies on Wyoming risks.

A question which occurs to us and is not addressed by the appellant is: For what purpose is appellant's

argument advanced? Is it advanced for the purpose of attacking the $5,000.00 penalty imposed by the Insurance Commissioner for appellant's past conduct of business without a certificate of authority? or is it advanced, perhaps, for the purpose of arguing that even if we decide this case adversely to the appellant, appellant should still be allowed to continue servicing its existing policies without obtaining a certificate of authority? Rule 5.01(5), W.R.A.P., requires a conclusion in appellant's brief stating the precise relief sought. Appellant's plea for relief in its brief appears restricted to a request that the Insurance Department's order be overturned and does not appear to contemplate the survival of any portion of the Commissioner's order. Accordingly, we assume that issue of the need for a certificate of authority is raised for the purpose of attacking the $5,000.00 penalty assessed against appellant.

Section 26-3-105(a), W.S.1977, provides:

> "(a) No person shall act as an insurer and no insurer shall transact insurance in this state except as authorized by a subsisting certificate of authority granted to it by the commissioner, except as to such transactions as are expressly otherwise provided in this code."

As discussed in Issues V and VI, appellant's Wyoming members were encouraged to solicit eligible Wyoming risks and appellant advertised in national military publications sent into Wyoming. Until the instant proceedings, appellant was doing more than simply servicing existing Wyoming policies; it was seeking new ones. Indeed, § 26-1-110(a) defines transacting insurance to include:

> "(i) Solicitation or inducement;
>
> "(ii) Negotiations;

"(iii) Effectuation of a contract of insurance;

"(iv) Transaction of matters subsequent to effectuation and arising out of such a contract."

In light of the above statutory provisions and facts, appellant was, prior to the time this action was commenced, doing more than servicing existing Wyoming policies and, therefore, in violation of the law in failing to obtain a certificate of authority. The penalty was properly assessed against it under § 26-1-115, W.S. 1977. (It should be pointed out that this case began before the 1977 re-numbering of our statutes, but the statutes cited had all been enacted prior to the commencement of this case.)

ISSUE NO. X

As its final issue, appellant argues:

"The Commissioner's Decision and Actions herein disregard the rights of AFCIA's members as consumers and fail to follow the spirit of most recently developing law of Consumer Protection."

For lack of relevant authority, we need not consider this issue.

Affirmed.

APPENDIX B

STATE OF WYOMING)
) SS.
COUNTY OF LARAMIE)

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

Docket 81 No. 74

ARMED FORCES COOPERATIVE
INSURING ASSOCIATION,
Petitioner-Appellant,

vs.

DEPARTMENT OF INSURANCE,
STATE OF WYOMING
Respondent-Appellee.

JUDGMENT

(Filed January 24, 1980)

The above entitled matter having come on to be heard upon Petitioner-Appellant's appeal of an adverse administrative decision by John T. Langdon, Wyoming Commissioner of Insurance, and the Court, having reviewed the briefs, heard arguments of counsel, and being otherwise fully advised in the premises, it is;

ORDERED, ADJUDGED and DECREED that the administrative decision of the Wyoming Insurance Commission dated December 27, 1976, is hereby affirmed, and Judgment is had by Respondent-Appellee, Insurance Department of the State of Wyoming; and,

IT IS FURTHER ORDERED that this Court's opinion letter of March 1, 1979, is incorporated herein by refer-

ence; and that p. (4) of said opinion letter be amended by adding a sentence which reads: "Therefore I find that AFCIA is not a federal instrumentality; further that it is not demonstrated that state taxation or regulation would adversely affect it."

DONE AND ORDERED this 22 day of January, 1980.

/s/ R. M. Forrister
R. M. Forrister, District Judge

Approved as to Form:

/s/ Ward A. White
Attorney for Petitioner-Appellant

/s/ Samual A. Soule
Attorney for Respondent-Appellee

/s/ Franklin J. Smith
Attorney for Amicus Curiae

APPENDIX C

THE STATE OF WYOMING

R. M. Forrister, Judge — Bob L. Neill, Reporter

March 1, 1979

Mr. Samuel A. Soule
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RE: ARMED FORCES COOPERATIVE INSURING ASSOCIATION vs. DEPARTMENT OF INSURANCE, STATE OF WYOMING Laramie County Docket No. 81-74

DECISION LETTER

(Filed January 30, 1980)

Gentlemen:

This administrative appeal was argued in Cheyenne May 8, 1978, with briefing completed July, 1978. The Court decides to leave the agency action as it stands.

The case file is large, the briefing extensive and detailed. AFCIA has an interesting, in some ways unique history. But in spite of the urgings of the disputants, I do not feel this case really cries for one particular answer, that one or the other must prevail lest grave injustice be done. I don't foresee dire consequences, whether the

State does or does not tax and regulate. There's no evidence of a dubious AFCIA insurance operation, but the State has a legitimate interest in regulating insurers.

The case turns largely on burden of proof and on what the Administrative Procedure Act requires of a petitioner if he is to overturn an agency action. Petitioner has not carried its burden with respect to any of the five subsections of WS 9-4-114(c).

Herewith comments on contentions of petitioner:

(1) *Agency procedure.* None of these numerous items seems clearly unlawful, though I believe it would have been statesmanlike to set a lower fine. Neither do I find a convincing cumulative effect; some of the actions are susceptible of more than one interpretation, others wholly innocuous. Independent and presumably more objective hearing officers are desirable but not required now.

(2) *Aparicio policy cancellation.* While it may have been unwise for the agency to request a cancellation, this action simply does not reach the status of unconstitutional impairment of contract.

(3) *Enclave, preemption, exclusive U. S. jurisdiction.* This is principally a matter of reading cases and assessing their persuasiveness. I see most AFCIA cited cases as readily distinguishable. AFCIA activities are in a large measure physically at Fort Leavenworth, but not exclusively so. Its insurance seems a good thing for many military officers, but the availability is still far from universal; AFCIA is not congressionally authorized; its activities appear clearly proprietary and not governmental. The much discussed McCarran-Ferguson Act touches but does not control our question. And while AFCIA asserts it is federally regulated, I'm not convinced it has the sort of

regulation normally done to assure the soundness of commercial insurers.

(4) *Instrumentality.* Many enclave comments apply here. Of the factors said to indicate a federally instrumentality, some are not found here at all and others are found only in part. State taxation or regulation would not certainly impair the usefulness of AFCIA anyway; such a problem could but would not necessarily arise.

(5) *Due process requirements for taxation and regulation.* I'm not convinced that a substantial tangible physical presence in Wyoming is required. *Todd* is an impressive discussion but not necessarily controlling. I cannot agree that *Ministers* and *People v. United National Life* were incorrectly decided; indeed the decision in *Ministers* particularly appears well reasoned. Admittedly some of the contacts recited by the commissioner are not directly AFCIA's, but some do qualify and in the aggregate justify regulation. Regulation of insurers may be permissible in circumstances which might not warrant regulation of retail sales; I suspect there's a trend of decisions toward doing so.

(6) *Apportionment, unconstitutionality of tax.* AFCIA contends the statute itself, or at least its application, is unconstitutional for lack of apportionment between Wyoming and out of state activities. Our statute does contain a direction for apportionment of a sort. Looking at cases such as *General Motors v. Washington, National Liberty Life* and again *Ministers* and *People v. United National Life* I cannot reach a conclusion of clear unconstitutionality; nor agree that the Agency action is void entirely on account of declining to rule on this legal question.

(7) *Exemption by Wyoming Insurance Code.* The agreed statement that AFCIA is "presently not transacting new business" does not satisfy this requirement.

The discussion of consumerism appears too general an argument, and it lacks a showing of broad interest (numbers of insureds). I ask the State to prepare judgment for approval by opponent counsel as to form.

Very truly yours,

/s/ R. M. Forrister
R. M. Forrister
District Judge

RMF:ljj

APPENDIX D

DEPARTMENT OF INSURANCE
STATE OF WYOMING

DOCKET NO. 76-33

WYOMING INSURANCE DEPARTMENT
Complainant,

vs.

ARMED FORCES COOPERATIVE INSURING ASSOCIATION
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW DECISION, AND ORDER

(Filed December 27, 1976)

The above captioned matter came on for hearing at 9:30 a.m., on the 18th day of November, 1976, before the Commissioner of Insurance for the State of Wyoming, John T. Langdon, as a result of a complaint filed with the Department of Insurance by Merle Johnson, Assistant Insurance Commissioner. Armed Forces Cooperative Insurance Association (hereinafter referred to as AFCIA), the Respondent in the above entitled action, was represented by James C. Logan, Attorney at Law from Kansas City, Missouri, and Georgina Guy, Attorney at Law from Cheyenne, Wyoming. The Wyoming Insurance Department was represented by Art Hanscum, Assistant Attorney General for the State of Wyoming.

Testimony was received, arguments were heard, and the parties to the action submitted written briefs or case authority on the general issue of whether the activities of AFCIA in Wyoming constitute the transaction of insur-

ance business and, if so, whether AFCIA is required to obtain a certificate of authority from the Department of Insurance to continue its activities and whether it must pay premium tax to the State of Wyoming on the insurance written on Wyoming risks.

As a result of a pre-hearing conference held on October 28, 1976, the parties to this action were able to agree on a stipulated set of facts and the issues to be determined at hearing. Those issues, along with others that were raised by the evidence received into the record, include the following:

(1) Is AFCIA, by virtue of the fact that it has insured the property of Wyoming residents by mail, transacting the business of insurance in Wyoming as defined by W.S. 26.1-10, and if so must AFCIA obtain a certificate of authority to continue to transact insurance as required by W.S. 26.1-50 and 26.1-566 and must AFCIA pay premium tax to the State of Wyoming on the insurance written as required by W.S. 26.1-80?

(2) If so, has the United States assumed exclusive jurisdiction over the activities of AFCIA, thereby preempting state regulation and taxation, by virtue of the Kansas Cession Act of 1875, under which the military reservation upon which AFCIA is domiciled was ceded to the United States?

(3) If not, is AFCIA exempt from the requirement that it must obtain a certificate of authority by the provisions of W.S. 26.1-51(b) on the basis that AFCIA is not transacting new business?

(4) If not, is AFCIA exempt from state regulation and taxation because it qualifies as a fraternal benefit society pursuant to the provisions of W.S. 26.1-620 and 26.1-661?

(5) If not, is W.S. 26.1-80(a), insofar as it requires the payment of premium tax for insurance placed on Wyoming risks or residents, invalid because it fails to apportion the tax due between those activities conducted outside of the state and those activities carried on within the State of Wyoming?

(6) Has the Department of Insurance, through its investigation and prosecution of the above referenced matter, violated the provisions of W.S. 9-276.32?

(7) Has AFCIA been deprived of due process of law and other constitutional guarantees because the Commissioner of Insurance, John T. Langdon, presided over the hearing in the instant matter?

Based upon the pre-hearing order, the pleadings, the evidence adduced through the testimony of witnesses, evidence received as exhibits, the arguments and briefs of counsel, and being fully and completely advised on the premises, I make Findings of Fact, Conclusions of Law, a Decision and Order as hereinafter set forth.

FINDINGS OF FACT

1. The Department of Insurance, Complainant in the above entitled action, is a governmental agency in Wyoming statutorily charged with the regulation of any entity which transacts the business of insurance in Wyoming, as defined by W.S. 26.1-10.

2. AFCIA, the Respondent in the above entitled action, is an unincorproated, not for profit property and casualty insurer domiciled on a federal military reservation adjoining the city of Ft. Leavenworth, Kansas. AFCIA, which provides insurance coverage only to eligible members of the armed forces, was organized on February 7, 1887, and has since then transacted the business of insur-

ance until the present day. It possesses no certificate of authority to transact insurance in any state, including Wyoming.

3. On or about August 20, 1976, Lt. Col. Arthur Aparicio contacted the Wyoming Insurance Department to inquire about the status of AFCIA in Wyoming. Lt. Col. Aparicio, who had only recently purchased a new home in Cheyenne, was interested in insuring his home with AFCIA. He was advised by Merle Johnson, Assistant Insurance Commissioner, that AFCIA did not have a certificate of authority to transact insurance in Wyoming and therefore could not provide coverage for a property risk of a Wyoming resident. Shortly thereafter, Mr. Johnson received a call from Thomas O'Malley, a representative of Capitol Savings & Loan, the mortgagee of Lt. Col. Aparicio's new home, regarding a policy of insurance issued to Aparicio, with O'Malley wanting to know whether the home was properly insured. Assistant Commissioner Johnson again responded that unless AFCIA was a licensed insurer in the State of Wyoming it could not legally cover the property risk of a Wyoming resident. Thereafter, Assistant Commissioner Johnson called a representative of AFCIA in Ft. Leavenworth, Kansas, and advised him to cancel Aparicio's policy of insurance and refund his premium in full, both of which were thereafter done. Subsequent to September 15, 1976, Assistant Commissioner Johnson discovered other Wyoming residents whose real and personal property was insured by AFCIA.

4. On or about September 15, 1976, Assistant Commissioner Johnson filed a complaint with the Wyoming Insurance Department, alleging that AFCIA was transacting insurance in Wyoming without the benefit of a certificate of authority, in violation of W.S. 26.1-50 and 26.1-566 and, further, that AFCIA had not paid a premium

tax to the State of Wyoming on insurance written on Wyoming risks as required by W.S. 26.1-80. On the same day, a notice to show cause was issued by the Commissioner of Insurance notifying AFCIA that the Department of Insurance would convene a public hearing on October 5, 1976, to ascertain whether the allegations made by Assistant Commissioner Johnson were true. At the request of AFCIA, the hearing was postponed several times, and the matter was finally set for hearing on November 18, 1976. On October 28, 1976, a pre-hearing conference was held in the offices of the Insurance Department, resulting in a pre-hearing order dated November 3, 1976. On October 28, 1976, AFCIA also filed a motion to dismiss the complaint, said motion being denied after arguments were heard on November 18, 1976, prior to hearing. On November 12, 1976, AFCIA filed (1) an answer to Assistant Commissioner Johnson's complaint, (2) another motion for continuance of the hearing, which was denied, and (3) its suggestions and objections to the pre-hearing order entered on November 3, 1976. On November 10, 1976, a list of witnesses to appear on behalf of AFCIA was filed with the Department, and on November 18, 1976, AFCIA filed a special answer to the charges alleged in the Department's complaint. On November 18, 1976, oral arguments were heard and testimony was received by the Commissioner of Insurance on the general question of whether AFCIA was transacting the business of insurance in Wyoming without benefit of a certificate of authority.

5. At all times subsequent to the filing of the complaint, the Commissioner of Insurance, who also was the hearing officer in the above entitled matter, was aware of the Department's position concerning the question of whether AFCIA was transacting insurance in Wyoming without a certificate of authority and, of necessity, many procedural matters were discussed between the Commis-

sioner and other members of the department concerning the forthcoming hearing with AFCIA. At no time, however, did the Commissioner participate with Assistant Commissioner Johnson or the Attorney General's office in the investigation and prosecution of the case against AFCIA, nor were the issues in the above entitled matter nor any possible sanctions which could be imposed against AFCIA by the Commissioner of Insurance predetermined prior to the hearing on November 18, 1976.

6. The home office of AFCIA is located on federal property near Ft. Leavenworth, Kansas, said property being ceded to the United States by the Kansas Cession Act of 1875. AFCIA is somewhat of a unique insurer in that it is a not for profit, unincorporated association which has not authorized nor issued any capital stock. It pays no state income tax, property tax, or premium tax, nor is it presently regulated or controlled by any state regulatory body, including AFCIA's domiciliary state of Kansas. Any warrant or commissioned officer in the armed forces of the United States is eligible for membership in AFCIA, and all officers and the top three grades of enlisted personnel in any branch of the armed forces are eligible to procure insurance, and they may obtain insurance regardless of whether they hold membership in AFCIA.

7. There are presently ninety-nine Wyoming residents who insure their property with AFCIA. Of these ninety-nine policyholders, eighty-four had been previously insured with AFCIA prior to moving to Wyoming, and of the fifteen policyholders who had established residence in Wyoming prior to becoming insured with AFCIA, three reside on federal property at Warren Air Force Base in Cheyenne. Total premium volume from AFCIA's ninety-nine Wyoming policyholders during 1976 amounted to $11,005.70. By agreement with the Wyoming Insurance Department, AFCIA is

not presently engaged in writing new business in Wyoming, but existing policies of property and casualty insurance are extended for a new term as they expire.

8. Each of the ninety-nine Wyoming policyholders obtained their coverage from AFCIA by dealing directly with the home office in Ft. Leavenworth, Kansas. AFCIA does not employ any agents, salesmen, solicitors, or representatives to place insurance in Wyoming or in any other state, nor does AFCIA maintain an office or any type of salaried business contact in Wyoming. To obtain coverage from AFCIA, a prospective policyholder must mail his application to Ft. Leavenworth (the applicant may fill out a form contained in one of several military publications which advertise the AFCIA insurance product). If his application is successful, an insurance policy is then mailed back to the policyholder from Ft. Leavenworth, and the insured thereafter makes his premium payments by return mail. When one of AFCIA's insureds has a claim, he also contacts the home office in Ft. Leavenworth directly, and if his claim is approved the award is deposited by AFCIA in the Army National Bank in Ft. Leavenworth to the account of the claimant, subject to his withdrawal at any time. If there is any dispute as to coverage or the amount owing on the claim, the insured may designate an advisory board of not more than three members of AFCIA, who serve without remuneration, to examine the validity of the claim. If such persons are not available, the claimant may obtain statements from local police or firemen who may have investigated the loss, or he may obtain statements from disinterested witnesses and submit them directly to AFCIA. The claimant may also select and obtain the services of a professional adjuster, at AFCIA's expense, to formulate and prepare his claim if he deems it necessary. All claims are then reviewed by claims personnel for AFCIA and either approved or denied for payment.

9. Although AFCIA does not employ any agents, solicitors, or representatives in Wyoming to assist in the placement of insurance coverages on the property of Wyoming residents, nor does it maintain any office or salaried business personnel in the State of Wyoming, it nonetheless, of necessity, has certain other contacts with Wyoming. For example, AFCIA advertises the availability of property insurance to certain members of the armed forces in three publications known as the Army Times, Air Force Times, and Navy Times, and Wyoming residents do subscribe to these three publications. In the advertisements AFCIA provides a toll free number by which Wyoming residents can call the home office for an insurance application, and the advertisements also contain an application which can be mailed to Ft. Leavenworth by Wyoming residents seeking insurance from AFCIA. The application is mailed from Wyoming to Ft. Leavenworth and, if accepted, premium payments are then mailed from Wyoming to Ft. Leavenworth. Though ultimately accepted or denied in Kansas, the application is completed and signed in Wyoming, and for the successful applicant a policy of insurance is mailed to him in Wyoming. In the event of a claim, local Wyoming officials investigate the loss, and if the claim is payable payment is made to Wyoming residents. AFCIA's Wyoming policyholders may procure the services of a professional Wyoming adjuster at Company expense to investigate the loss and prepare the submission of the claim to AFCIA. The risk which is underwritten by AFCIA is minimized and otherwise controlled through local police, firemen, and other governmental officials. And finally, if a claim cannot be compromised or if one of AFCIA's policyholders tried to defraud the company, redress would be sought in Wyoming courts.

10. AFCIA holds regular meetings among its members at which regular military uniforms, medals, buttons,

insignia, etc., are worn. AFCIA's executive committee is empowered to admit or dismiss members, and a special logo or insignia comprised of an American eagle and five stars is used in AFCIA's publications, stationery, and jewelry. With the excepton of the logo, however, the caps, shirts, ribbons, buttons, pins, uniforms, and medals worn by members of AFCIA are the same as those worn by non-member military officers in the armed forces, and the salutes, the display of flags, and the pledge of allegiance which characterize the meetings of AFCIA are no different from the customs followed by military officers who are not members of AFCIA.

CONCLUSIONS OF LAW

I.

IS AFCIA TRANSACTING THE BUSINESS OF INSURANCE IN WYOMING AS DEFINED BY W.S. 26.1-10 AND, IF SO, CAN THE WYOMING INSURANCE DEPARTMENT REGULATE THE INSURANCE ACTIVITIES OF AFCIA WITHOUT VIOLATING CONSTITUTIONAL GUARANTEES OF DUE PROCESS?

There is no doubt in my mind that AFCIA is transacting the business of insurance in Wyoming. "Transacting insurance", as defined by W.S. 26.1-10, includes (1) solicitation or inducement; (2) negotiations; (3) effectuation of a contract of insurance; or (4) transaction of matters subsequent to effectuation and arising out of such a contract. By advertising an insurance product in the Army Times, the Air Force Times, and the Navy Times, all publications which are mailed into Wyoming and to which Wyoming residents subscribe, AFCIA is clearly soliciting prospective policyholders to purchase insurance policies. It matters not that such publications are read or subscribed

to primarily by military personnel, any more than it would for the company who solicits only doctors or lawyers. Nor does it matter that few people purchase insurance from AFCIA as a direct result of the solicitations, since the mere fact that there are solicitations is sufficient to constitute the transaction of insurance under W.S. 26.1-10. Moreover, the fact that applications are mailed into Wyoming to interested persons (which in itself constitutes a solicitation), filled out and signed by Wyoming residents, and then mailed back to AFCIA all constitute "negotiations preliminary to execution" and the "execution of a contract of insurance." It is not true, as AFCIA contends, that the contract is executed solely in the State of Kansas. The offer to insure is made in Wyoming when an application is mailed here to be filled out by the prospective policyholder, and while the acceptance of the application by AFCIA may occur in Kansas, the contract is not ultimately complete until a policy of insurance is delivered back to the insured in Wyoming, where the policy can be refused if it does not conform to the insured's understanding of the contract. Finally, the "transaction of matters subsequent to execution of the contract and arising out of it "must surely occur in Wyoming, since any loss incurred by an AFCIA policy holder is investigated in Wyoming, payment on a loss covered by the policy is ultimately made to a Wyoming resident, and any dispute as to policy coverage would be resolved in the Wyoming courts.

The Respondent contends that it does not have sufficient contact with the State of Wyoming to warrant regulatory control by the Wyoming Insurance Department and, notwithstanding the provisions of W.S. 26.1-10, any attempt to regulate the activities of AFCIA would violate constitutional guarantees of due process. According to the Respondent, the only substantial contact that AFCIA has with the State of Wyoming is the fact that the prop-

erty insured is situated in Wyoming, and that one contact, standing alone, has been declared insufficient by the United States Supreme Court in *State Board of Insurance v. Todd Shipyards*, 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed.2d 620 (1962), to subject AFCIA to regulatory control. The Complainant, on the other hand, contends that (1) AFCIA advertises its products in Wyoming; (2) AFCIA provides a toll free number in Wyoming for use by potential policyholders; (3) the property insured is located in Wyoming; (4) the persons insured are residents of Wyoming; (5) the application for insurance is mailed into Wyoming; (6) premium payments are mailed by Wyoming policyholders to AFCIA's home office; (7) applications for insurance are completed and signed in Wyoming; (8) payment for losses incurred is made by IFCIA to Wyoming policyholders; (9) losses are investigated in Wyoming by local officials, and Wyoming policyholders may obtain the professional services of a Wyoming adjuster to prepare and submit a claim to AFCIA; and (10) any litigation which might arise because of a dispute or disagreement regarding policy coverages would be initiated and resolved in Wyoming courts. Because of these accumulated contacts with the State of Wyoming the Complainant contends that AFCIA is constitutionally subject to the regulation and control of the Wyoming Insurance Department, relying primarily upon the cases of *Ministers Life & Casualty Union v. Haase*, 30 Wis.2d 339, 141 N.W.2d 287 (1966), *cert. den.*, 385 U.S. 205, 87 S.Ct. 407, 17 L.Ed.2d 301 (1966) and *People v. United National Life Ins. Co.*, 66 Cal.2d 577, 58 Cal.Rptr. 599, 427 P.2d 199 (1967), *cert. den.*, 389 U.S. 330, 88 S.Ct. 506, 19 L.Ed.2d 562 (1967).

A determination of whether the authority cited by the Respondent is more persuasive than that relied upon by the Complainant requires some discussion of the case law. In addition to *Todd Shipyards, supra*, Respondent

cites the decisions of *Allgeyer v. State of Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897), *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297 (1922), and *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 (1938), for the position that Wyoming cannot constitutionally regulate the activities of AFCIA. In *Allgeyer*, the court held that the State of Louisiana could not regulate an insurance contract executed in New York which insured cotton bales being shipped from New Orleans to foreign ports, where the only contact with the State of Louisiana, other than the residency of the insured in Louisiana and the fact that the property insured was situated there, was a communication made by the insured to the insurer requesting coverage as to a particular shipment of goods. In *St. Louis Cotton Compress, supra*, the court invalidated a statute which imposed a tax on unauthorized insurance companies doing business in Missouri on grounds of due process, where the insured contracted with an unauthorized company in Missouri to insure his property in Arkansas against loss caused by fire. The court held that there was no act done within the State of Missouri upon which regulation could be justified, noting that whereas a state may regulate the activities of foreign corporations which occur within the boundaries of the state it cannot regulate nor interfere with what a foreign corporation does outside of the state. In *Connecticut General Life Ins. Co., supra*, the court invalidated a taxing statute in California which sought to impose a tax on reinsurance contracts, holding that where the reinsurance contract was executed in Connecticut, where the premiums were paid and where any losses were payable, there was no contact with the State of California which would warrant the imposition of a premium tax, even though both parties to the reinsurance contract were licensed to do business in California.

Subsequent to *Connecticut General*, but prior to *Todd Shipyards*, the Supreme Court handed down the decisions of *Osborn v. Ozlin*, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074 (1940), and *Hoopston Canning Co. v. Cullen*, 318 U.S. 313, 63 S.Ct. 602, 87 L.Ed. 777 (1943), both relied upon by the Complainant and both signaling a somewhat different attitude of the Supreme Court concerning the sufficiency of contact necessary to subject a foreign insurer to state regulation. In *Osborn*, the court upheld a Virginia statute which prohibited insurers licensed in Virginia from making contracts of insurance on persons or property in the state except through licensed resident-agents who were to countersign such policies and receive at least one-half of the customary commission. Denying the contention that the Virginia statute sought to intrude upon business transactions beyond Virginia borders, the court held that the interest of Virginia in the risks which the contracts in question were designed to prevent warrants the kind of control that Virginia sought to impose. In *Hoopeston*, the court considered the constitutionality of a New York statute which prohibited reciprocal insurance associations from doing business in New York unless properly licensed therein. In this case the insurer argued that the statute as applied to reciprocal insurers was unconstitutional since the contracts were signed in Illinois by an attorney-in-fact and losses were paid by checks mailed from Illinois. Rejecting this contention, the court upheld the statute, reasoning that the real issue does not concern where the insurance contract was executed, but whether the insurance enterprise as a whole so affects New York interests as to give the State of New York the power it claims.

Finally, in 1962, the court was asked to re-examine and perhaps reconcile its prior decisions in the case of *State Board of Insurance v. Todd Shipyards, supra*, upon

which the Respondent places great reliance. In this case the court held that a Texas statute, which imposed a five percent premium tax on policies purchased from an insurer not licensed in Texas but covering risks in that state, was unconstitutional. The insurer, which was not licensed to transact business in Texas, issued a policy of insurance to a New York corporation owning property in Texas and licensed to do business there. In holding that the taxing statute was unconstitutional, however, the court makes it very clear that neither the making of the contract nor its performance involved any activity in the State of Texas:

> The insurance transactions involved in the present litigation take place entirely outside of Texas. The insurance, which is principally insurance arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.
>
> The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas. *Supra*, at 454-55.

The effect of *Todd Shipyards* on the *Osborn* and *Hoopeston Canning Co.* decisions does not, in my opinion, require further analysis, nor is it necessary to inquire

into the continuing viability of *Allgeyer, St. Louis Cotton Compress,* and *Connecticut General* because all of the cases upon which the Respondent relies are easily distinguishable from the instant case. In the cases cited by the Respondent nothing was done by the insurers in the regulating states, nor does any of the Respondent's cases deal with the crucial question of mail-order solicitation or mailing applications, delivering policies, payment of premiums, investigating losses, payment of claims, and settling policy disputes in the state asserting regulatory control. To read *Todd Shipyards* and the trilogy of cases which it apparently re-affirms as meaning that a state cannot reach any contract of insurance made beyond its borders is, in my opinion, error. As the court in *Howell v. Rosecliff Realty Co.*, 52 N.J. 313, 245 A.2d 318, 323 (1968), states:

> We think *Todd Shipyards* means no more than this, that insurance transactions of the kinds involved in *Todd Shipyards* and (*Allgeyer, St. Louis Cotton Compress,* and *Connecticut General*) cannot be taxed or regulated if the only connection with the State is the location therein of the risk insured, but the State may deal with the insurance if activities either in the making or in the performance of the contract occur within its border. *Id.* at 325.

The court in *Howell* goes on to say that:

> Thus the plain inference from *Todd Shipyards* is that if there were activity within a State either in the making or in the performance of the contract, the State could exercise its governmental powers to further its undoubted interests in insurable risks within its borders. *Id.*

This interpretation of *Todd Shipyards* is followed by two cases relied upon by the Complainant, both of which

involve factual situations which are nearly identical to the facts of the instant case and both of which are more persuasive than the Respondent's interpretation of *Todd Shipyards* and its progeny. In *Ministers Life & Casualty v. Haase, supra,* a declaratory judgment action was commenced to determine the validity of a Wisconsin statute regulating and taxing unlicensed foreign mail-order insurance companies. Ministers was not licensed to conduct business in Wisconsin, had no agents there, and operated on a direct-mail basis. It solicited business through advertisements in national publications and in church and other religious publications. Upon receiving an inquiry from a prospective policyholder at its home office in Minneapolis, Ministers would mail an application to the prospect, who would fill it out and mail it back to Ministers. The policy was prepared, signed, and mailed to the applicant from the home office of Ministers. All mailing of premium notices emanated from the home office and all premiums were payable and received there. Claims were paid directly from the home office on proof-of-claim forms furnished to the claimant upon request. Ministers had no office, representative, bank account, or real estate in Wisconsin, and a significant number of policies held by residents of Wisconsin were issued while such persons were residents of other states. In holding that the activities of Ministers were subject to the regulation and taxation of the State of Wisconsin, the court held:

> Ministers had "realistically entered the state looking for and obtaining business" . . . The activities essential to the conduct of this business, both prior to and subsequent to the making of the contract are part of the organic whole, take place in Wisconsin and, in addition, the subjects of the insurance are in this state. In common parlance it cannot be said that Ministers does not do business in Wisconsin.

Even more factually in point is the California decision of *People v. National Life Insurance Co., supra,* in which an action was brought by the California Insurance Commissioner against three foreign insurance companies to enjoin them from soliciting California residents by mail from offices outside of California without first obtaining a certificate of authority in compliance with the California Insurance Code. As with the instant case, the defendant companies solicited residents of California by mailing applications to them from the home office of the companies. As here, none of the three companies had offices, agents, or representatives in California, nor had they at any time applied nor received from the Commissioner of Insurance a certificate of authority. In upholding the authority of the California Insurance Department to regulate the mail-order activities of the three defendant companies, the court held:

> Applying due process criteria which give recognition to the substantial interest of the regulating state in the insurance transactions involved, we are satisfied that in the circumstances of the instant cases there are sufficient contacts with California to justify regulation. The insureds are, of course, residents of California. The solicitation of insurance actually takes place in California where the advertising material and other forms are received by the individual addressees. Thus realistically viewed the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state. (citations omitted). In response to this solicitation, California residents complete and sign in this state the applications for insurance . . . In all instances payment of premiums is made by California residents from funds

> or bank accounts located in California. It is clear that any claims made under the policies will most likely be investigated in this state and that any litigation in connection with the policies will undoubtedly be commenced in California courts. It is also foreseeable that should defendants for any reason fail to perform their obligations in accordance with the policies, California might be called upon to provide assistance for the persons within its borders who were intended to be financially assisted by the benefits under the policies.
>
> In short, these defendants have "realistically entered the state looking for and obtaining business" (citation omitted); the main aspects of their insurance transactions are in this state; and to say that they are not doing business here "is to completely ignore the facts of life and reality." (citation omitted). We think the substantial interest of California in these transactions is obvious.

The Respondent has attempted to distinguish the cogent rationale of *Ministers* and *United National Life* on the following grounds: (1) they were based on a faulty interpretation of *Todd Shipyards;* (2) both are state court cases which were decided in a different judicial atmosphere; (3) W.S. 17-36.104 (Wyoming Business Corporation Act) requires substantial contact with the forum state before regulation of a foreign corporation is warranted, as does the Wyoming decision of *Cozzens v. Piper Aircraft Corp.*, 514 P.2d 1375 (Wyo. 1973), interpreting the minimum contacts required for jurisdictional purposes under Wyoming's long arm statute; (4) both were concerned with mass mailings in a systematic attempt to canvass thousands of people; and (5) both involved insurers whose policyholders in the states which were asserting regulatory controls numbered

hundreds or thousands, while in the instant case the Respondent has only ninety-nine insureds in Wyoming, and most of those either live on a military reservation or they were previously insured while residing in a different state.

In the first place the analyses of *Ministers, United National Life,* and *Howell* of the *Todd Shipyards* decision in my opinion are not based upon faulty reasoning. To the contrary, these decisions are thorough and well-reasoned and they establish convincingly that *Todd Shipyards* has no application where mail-order insurers are involved. Indeed, if the Supreme Court of the United States saw serious error in *Ministers* or *United National Life* it is certainly arguable that it would not have dismissed both cases on appeal for lack of a substantial federal question. Secondly, it is very doubtful that W.S. 17-36.104 has any application to a foreign insurer, as the Respondent suggests, because W.S. 17-36.3 exempts insurers from the provisions of the Business Corporations Act, and W.S. 26.1-70 contains its own provisions for substituted service upon a foreign insurance company. If it is the argument of Respondent that W.S. 17-36.104 requires a greater showing of contact for purposes of service of process than has been made here, he would be well advised to read the Supreme Court decision of *McGee v. International Life Insurance Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1958), where the court upheld a judgment obtained in California by service of process upon an unauthorized foreign insurer by registered mail. As far as *Cozzens v. Piper Aircraft Corp., supra,* is concerned, suffice it to say that the court was not dealing with the contact necessary to subject a foreign insurer to the regulatory control of a state administrative agency, but rather with the degree of contact necessary to subject an out of state defendant to the in personam jurisdiction of the Wyoming courts. Third, I

am not convinced that the Respondent's activity in Wyoming has been "casual, isolated, or sporadic," as Respondent contends, nor am I convinced that the number of AFCIA policyholders or the relatively insignificant amount of premium volume do not constitute significant contacts in Wyoming. In the *Ministers* decision the insurer in question had 626 policyholders and $83,516 in premium volume from the state of Wisconsin. If the population of Wisconsin were proportionately equated with that of Wyoming, the activity of AFCIA in Wyoming in terms of premium volume and number of policyholders would roughly equal that of Ministers Casualty and Life in Wisconsin.

In sum, it is my conclusion that AFCIA is transacting the business of insurance in Wyoming and that it is subject to the same regulatory provisions as any other foreign insurance company who transacts business here. Insurance is so imbued with the public interest that regulation of insurers who transact business here to ensure their solvency is not only desirable but very necessary. In the words of *Howell v. Rosecliff Realty Co., supra*, at 324:

> Insurance is so essential a part of the area of a State's primary responsibility that the State's power should not depend upon where the parties choose to contract for the insurance or to pay the loss. The State's interest and its responsibility to its citizens should be enough to support regulation and taxation of policies relating to the risks within its jurisdiction. Moreover, the foreign carrier, no less than the admitted company, is aided by the measures the State takes to limit the incidence of the losses covered by insurance. Hence there should be no need to find additional contacts or activities within a State to enable the State to act.

II.

HAS THE UNITED STATES ASSUMED EXCLUSIVE JURISDICTION OVER THE ACTIVITIES OF AFCIA, THEREBY PREEMPTING STATE REGULATION AND TAXATION, BY VIRTUE OF THE KANSAS CESSION ACT OF 1887, UNDER WHICH THE MILITARY RESERVATION UPON WHICH AFCIA IS DOMICILED WAS CEDED TO THE UNITED STATES, AND MUST THE STATE OF WYOMING ACCORD FULL FAITH AND CREDIT TO THE PUBLIC LAWS OF KANSAS WHICH, AS FAR AS KANSAS IS CONCERNED, PRECLUDE STATE REGULATION AND TAXATION OF AFCIA?

The Respondent has argued that the State of Wyoming has no authority to regulate the activities of AFCIA on the grounds that (1) the United States, by preempting the right of Wyoming or any other state to regulate or tax the non-profit business activities of AFCIA, has assumed exclusive jurisdiction over the activities of AFCIA; (2) since Kansas ceded the property upon which AFCIA is situated to the United States and has, by statute, conceded to the United States the power to regulate or tax any activities that may occur on the Ft. Leavenworth military reservation, the State of Wyoming must accord full faith and credit to those provisions, as required by Article IV, Section 1 of the United States Constitution; and (3) because the State of Wyoming has never before attempted to assert any type of regulatory jurisdiction over AFCIA that it is now estopped or it has now waived its right to do so, assuming that right otherwise exists.

Even if it can be said that the United States had exclusive jurisdiction over the insurance activities of a foreign insurer domiciled on federal land, that jurisdiction is lost, in my opinion, when the insurer chooses to enter

other areas for the purpose of transacting insurance. All of the cases upon which the Respondent relies to support the position that the federal government has exclusive jurisdiction over AFCIA concern activities which occur exclusively on federal land. The Respondent cites no cases where the same federal jurisdiction obtains when the entity sought to be regulated leaves its federal domicile to transact business in other domains. In view of the specific language of the McCarran-Ferguson Act and in absence of any other federal statute which would indicate total federal preemption in this area, I conclude that the State of Wyoming is not precluded, at least on the basis of the doctrine of federal preemption, from regulating the Wyoming activities of a foreign insurer domiciled on federal land.

If the Respondent actually believes it is under the exclusive control and jurisdiction of the federal government, it is a curious fact that it should amend its policies of insurance to accommodate the laws of the various states in which it does business. Reference is made to the declaration sheet of Respondent's policy of insurance where, as part of "Coverages and Limit of Liability" the Respondent has included "Special State Provisions" for South Carolina's Valuation Clause and New York's Coinsurance Clause. On page two of the policy, moreover, two state exceptions for Kansas and North Dakota are included which automatically amend the policy for Kansas and North Dakota policyholders to conform to the laws of those two states.

Neither can I see where the full faith and credit clause of the United States Constitution has any application to the interstate activities of the Respondent. The Respondent's argument seems to be that because the State of Kansas has conceded to the United States the right to

regulate and tax those activities of AFCIA occurring on federal land, the State of Wyoming is constitutionally bound to adhere to those same concessions on the theory of full faith and credit. If so, this argument defies the intent of the McCarran-Ferguson Act. If the full faith and credit clause was meant to be applied in this fashion, it could just as easily be argued that any domestic insurer in Kansas doing business in Wyoming should be regulated not by the laws of Wyoming, but by the Kansas Insurance Code.

Article IV, Section 1, of the United States Constitution has been applied mostly in the area of recognizing foreign judgments or decrees. Nothing in the Constitution insures unlimited extraterritorial recognition of all statutes or of any statute under all circumstances, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L.Ed. 1477, 61 S.Ct. 1020 (1941). A state will not be required to subordinate its own laws to the declared policy of another state when sufficient jurisdiction exists to warrant the application of the law of the forum. *Holland Furnace Co. v. Connelley*, 48 F.Supp. 543 (D.C. Mo. 1942). And specifically regarding the realm of insurance, Appleman has stated that:

> (I)t has been repeatedly held that a state may determine who may engage in the insurance business within its boundaries, and prescribe the terms upon which insurance companies may be authorized to transact such business. Accordingly, a state may impose on a foreign insurance company, seeking to transact business within its borders, such terms and conditions as it may deem proper, or it may exclude such insurer entirely.
>
> . . .

> No foreign insurance organization can do business within a state except by consent, and then it is bound by the same rules and limitations as are prescribed for domestic organizations engaged in a like enterprise. By doing business within the state, a foreign insurer subjects itself to the laws of that state state affecting its business. The statutes relating to foreign insurers doing business within the state are for the protection of the citizens of the state who do business with such foreign companies by vouchsafing to such citizens the same rights as they have when doing business with a company chartered within the state. 19 *Appleman* §10322 at 10-12 (1946).

Finally, the Respondent has raised the argument that because the State of Wyoming has never before attempted to assert any type of regulatory jurisdiction over AFCIA, nor has it ever required AFCIA to obtain a certificate of authority, it is now estopped to do so. This same argument was raised in the decision of *People v. United National Life Insurance Co., supra,* where the court held:

> "Mere failure to act, however, does not constitute an administrative construction" (Estate of Madison, supra) and the failure in the past of any of the officers of this state charged with the responsibility of enforcing section 700 to apply it to transactions like the present ones will not estop the people from doing so at some time thereafter. (Caminetti v. State Mut. Life Ins. Co., *supra,* 52 Cal.App.2d 321, 326, 126 P.2d 165.)

It is difficult to perceive how the State of Wyoming can waive or be estopped from applying its own laws. Although the record does not so indicate, it is certainly plausible that the Wyoming Insurance Department had never before been aware of the activities of AFCIA. The record does indicate that these proceedings were initiated

only after an inquisitive policyholder called the Department in an effort to confirm the legality of becoming a policyholder with AFCIA. At any rate, it is my conclusion that the defenses of waiver or estoppel are not available to preclude the regulation of a foreign insurer, particularly where regulating foreign insurers is so imbued with the public interest and welfare.

III.

IS AFCIA EXEMPTED FROM THE REQUIREMENT THAT IT MUST OBTAIN A CERTIFICATE OF AUTHORITY BY THE PROVISIONS OF W.S. 26.1-51(b) ON THE BASIS THAT AFCIA IS NOT TRANSACTING NEW BUSINESS?

The Respondent next argues that because AFCIA is not presently transacting any new business it is exempt from the requirement that it must obtain a certificate of authority by the provisions of W.S. 26.1-51(b). That provision states:

> (b) *Insurer not transacting new business.*—An insurer not transacting new insurance business in Wyoming but continuing collection of premiums on and servicing of policies remaining in force as to residents of or risks located in Wyoming, is transacting insurance in Wyoming for the purpose of premium tax requirements only and is not required to have a certificate of authority therefor...

The only reason that Respondent is not transacting new business in the State of Wyoming is because it agreed to cease and desist pending the outcome of the instant proceeding. Such being the case the Respondent can hardly avail itself of the exemption contained in W.S. 26.1-51(b). As recent as August 20, 1976, the Respondent

issued a policy of insurance, subsequently cancelled at the request of Merle Johnson, Assistant Commissioner, to Arthur J. Aparicio, Jr. in Cheyenne, Wyoming. Had it not been for the institution of these proceedings there is every reason to believe that the Respondent would be transacting new business in the State of Wyoming today.

W.S. 26.1-51(b) is inapplicable to the instant case for another reason. The Respondent is a casualty insurer, and although it would appear from the policy that payment of premium ensures automatic renewal, in fact every time AFCIA raises or lowers its rates, changes its policy language, or effects any other change in the status of its insureds, it has effectively negotiated a new contract of insurance with its insureds for the purpose of W.S. 26.1-51(b).

IV.

IS AFCIA EXEMPT FROM STATE REGULATION AND TAXATION BECAUSE IT QUALIFIES AS A FRATERNAL BENEFIT SOCIETY PURSUANT TO THE PROVISIONS OF W.S. 26.1-620 AND 26.1-661?

It requires a very vivid imagination to seriously contend that AFCIA is a fraternal benefit society entitled to an exemption from state regulation and taxation as provided for by W.S. 26.1-661(b). That section, along with W.S. 26.1-620, are set forth below:

> §26.1-620. "Fraternal benefit societies" defined.—(a) Any incorporated society, order or supreme lodge, without capital stock, including one exempted under the provisions of section 26.1-661 whether incorporated or not, conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system with ritualistic form of work, having

a representative form of government, and which makes provision for the payment of benefits in accordance with this chapter is hereby declared to be a fraternal benefit society.

§26.1-661. Exemption of certain societies.—Nothing contained in this chapter shall be so construed as to affect or apply to:

. . . .

(b) Orders, societies or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business, insuring only their own members and their families, and the ladies' societies or ladies' auxiliaries to such orders, societies or associations.

In the first place, as the Respondent points out, AFCIA insures non-members (i.e. the first three grades of enlisted men). Since under W.S. 26.1-620 a fraternal benefit society must be one "conducted solely for the benefit of its members and their beneficiaries," it is precluded on this basis alone from attaining the status of a fraternal. Secondly, AFCIA is exclusively a casualty insurer, and by the provisions of W.S. 26.1-633 a fraternal benefit society is only authorized to provide for the payment of (1) death benefits; (2) endowment benefits; (3) annuity benefits; (4) temporary or permanent disability benefits as a result of disease or accident; (5) hospital, medical or nursing benefits as a result of disease or accident; and (6) monument or tombstone benefits to the memory of deceased members not exceeding in any case the sum of three hundred dollars. AFCIA, therefore, does not make "provision for the payment of benefits in accordance with this chapter" as required by W.S. 26.1-620 and therefore cannot qualify as a fraternal benefit society. Third, AFCIA does not engage in the ritualism required of a fraternal. The

caps, shirts, ribbons, buttons, pins, uniforms, medals, salutes, the display of flags, and the pledge of allegiance, all of which purportedly characterize the meetings of AFCIA, are no different than the uniforms worn or the customs followed by any non-member military officer. Finally, with a fraternal benefit society, insurance is incidental to membership, being just one of many benefits, such as charitable activities, social functions, and general camaraderie, which members are eligible to receive or enjoy. With AFCIA, however, insurance is the primary, if not the only, benefit that inures to members as a result of membership in the association. Indeed, there has been no showing in this record that AFCIA engages in any eleemosynary or social activities for the benefit of its members; nor has there been any showing that members of AFCIA pay any dues or other type assessment to finance the type of activities normally associated with a fraternal benefit society.

For all of these reasons, I conclude that the Respondent is not a fraternal benefit society as defined by W.S. 26.1-620, and for that reason cannot qualify for the exemption provided by W.S. 26.1-661(b).

V.

IS W.S. 26.1-80(a) UNCONSTITUTIONAL BECAUSE IT FAILS TO APPORTION THE TAX DUE BETWEEN THOSE ACTIVITIES CONDUCTED OUTSIDE OF THE STATE AND THOSE ACTIVITIES CARRIED ON WITHIN THE STATE OF WYOMING?

On the strength of *National Liberty Life Insurance Co. v. State of Wisconsin*, 62 Wis.2d 347, 215 N.W.2d 26 (1974), it is the Respondent's position that W.S. 26.1-80(a) is unconstitutional because it fails to apportion the premium tax due the State of Wyoming on the basis of the Respon-

dent's activity in this state. While it has been held that an administrative tribunal is competent to pass upon constitutional issues which are germane to the proceedings before them, *Alcala v. Wyoming State Bd. of Barber Examiners*, 365 F.Supp. 560 (D.C. Wyo. 1973), it seems to me that this is a question which would be more appropriately raised on appeal before a court of law. If the constitutionality of W.S. 26.1-80(a) had more of a bearing on the primary issues in this proceeding, that is to say, on the question of whether the Respondent is transacting the business of insurance in Wyoming and whether the Wyoming Insurance Department can constitutionally regulate the Wyoming activities of the Respondent, I would be inclined to inquire further into the questions raised by the Respondent. As it is, a ruling at this level of the proceedings that W.S. 26.1-80(a) is unconstitutional would affect a countless number of insurers transacting business in the State of Wyoming and would disrupt the collection of premium tax from hundreds of other companies who are not as uniquely situated as the Respondent. For these reasons I defer this issue to a court of competent jurisdiction.

VI.

HAS THE DEPARTMENT OF INSURANCE, THROUGH ITS INVESTIGATION AND PROSECUTION OF THIS CASE, VIOLATED THE PROVISIONS OF W.S. 9-276.32?

In passing, the Respondent has contended that the Complainant is in violation of W.S. 9-276.32(c) because the Complainant has (1) acted without or in excess of its powers; (2) the actions of the Complainant are not in conformity with the law; and (3) the actions of the Complainant are not supported by substantial evidence. Since the provisions of W.S. 9-276.32(c) recite the grounds upon which a court of law may reverse an administrative de-

termination, the Respondent is somewhat premature in raising it here. Indeed, it is somewhat inane to even suggest that the Complainant, prior to the time an administrative decision has been rendered, has violated a statute which does nothing but enumerate the bases upon which a court of law can review an administrative decision.

VII.

HAS AFCIA BEEN DEPRIVED OF DUE PROCESS OF LAW BECAUSE THE COMMISSIONER OF INSURANCE PRESIDED OVER PROCEEDINGS WHICH WERE INITIATED BY STAFF MEMBERS OF THE WYOMING INSURANCE DEPARTMENT?

In raising the argument that the Respondent did not receive a fair and impartial hearing in these proceedings on the grounds that I presided over a hearing which was initiated and prosecuted by members of the Wyoming Insurance Department, the Respondent has made several disturbing accusations. For example, it has been alleged

(1) that Merle Johnson, Assistant Insurance Commissioner, resorted to breach of privacy and violated the civil rights of at least one AFCIA policyholder in "secretly obtaining their private insurance policies without judicial process" and countenanced "outright trickery" by an insurance agent who sold an insurance policy to a former AFCIA policyholder.

(2) that Assistant Commissioner Johnson was appointed by a former Commissioner of Insurance "who now directs a gigantic, powerful competitor, which in turn insures the Assistant Commissioner," insinuating that he has a personal stake in the outcome of these proceedings and that his motives for investigating this case were impure. The Respondent has further alleged that Assistant Commissioner Johnson has made a "career" of this case, "spend-

ing days and weeks investigating, 'lawyering' in the law library without a license to practice," that he instructed a witness on how to "dress up" for the hearing, and that he intentionally suppressed evidence favorable to the Respondent.

(3) that Assistant Commissioner Johnson and Deputy Commissioner Smith had determined prior to hearing that the Respondent was "guilty" of the charges specified in the Complaint and, further, that I had stated in a conversation on October 19, 1976, with Respondent's counsel that I considered the Respondent guilty of violating the law.

(4) that I deprived the Respondent of proper representation by declining to postpone the hearing because George Guy, Attorney at Law, was hospitalized at the time, that I refused to testify concerning the investigations made by members of the Wyoming Insurance Department, and that I required the Respondent to submit a written brief on Sunday, November 14, 1976, instead of the next business day.

(5) that the hearing was arranged so as to intimidate the witnesses for the Respondent, with each witness "required" to sit at a table "surrounded and overwhelmed" by the Commissioner, and Assistant Commissioner, the Deputy Commissioner and two Assistant Attorney Generals.

(6) that because of the bias, prejudice, impartiality, and pre-conceived notions of members of the Wyoming Insurance Department, it was impossible for the Respondent to receive a fair hearing.

The Respondent obviously does not share the view that state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular

controversy fairly on the basis of its own circumstances," *United States v. Morgan*, 313 U.S. 409, 421, 85 L.Ed. 1429, 61 S.Ct. 999 (1941). Yet the Respondent has failed to raise anything of substance which would lead me to conclude that AFCIA has not received a fair and impartial hearing. Assistant Commissioner Johnson was an advocate in these proceedings, and it is not surprising that he may have had strong opinions about the merits of the case. I don't see, however, where he acted improperly. In causing the insurance policy of one of AFCIA's policyholders to be subpoenaed he was acting within the provisions of W.S. 26.1-39. He violated no constitutional guarantees that I know of in requesting certain witnesses to testify or asking them to wear a military uniform to the hearing, and I know of no statute which requires him to have a license to practice law before he can be admitted into a law library. There is no evidence whatsoever that he had a vendetta against the Respondent, or that because he was appointed to his position by a former Commissioner of Insurance who now works for a competitor of the Respondent there is cause to question his motivations for instituting these proceedings.

Regarding the allegations made against me, the Respondent's request to postpone the hearing because of the hospitalization of George Guy was not granted because the matter had already been postponed several times, each requiring different arrangements for a place to conduct the hearing, arrangements for witnesses, etc. The Respondent knows that on November 3, 1976, when the date of November 14 was established for the submission of briefs, that I was not aware that it fell on a Sunday. The Respondent had ample time to file its brief on the preceding Friday, and in fact was advised to do so several times. The place where the hearing was conducted, while not ideal, cannot seriously be said to have had a substantial effect on the

outcome of these proceedings, and I don't think that the Respondent's witnesses were "overwhelmed" by the seating arrangements. After several postponements, it was the only room available.

The real substance of Respondent's argument seems to be that because one member of a governmental agency initiates some administrative action that every other member of that agency is thereby disqualified from presiding over an ensuing hearing. That clearly is not what is contemplated by the Wyoming Administrative Procedures Act. W.S. 9-276.30(a) states:

> If (not) otherwise authorized by law there shall preside at the taking of evidence in all contested cases (1) the statutory agency, or (2) one or more members of the body which comprises such agency, or (3) an employee of the agency or an employee of another agency designated by the agency to act as presiding officer. The functions of all those presiding in contested cases shall be conducted in an impartial manner. Any such officer shall at any time withdraw if he deems himself disqualified provided there are other qualified presiding officers available to act.

Nor is it a violation of due process for an administrative agency to both investigate and adjudicate the merits of a particular case, *Withrow v. Larkin*, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1458 (1975). "The case law, both federal and state, generally rejects the idea that the combination (of) judging (and) investigating functions is a denial of due process . . ." 2 Davis, Administrative Law Treatise §13.02 at 175 (1958).

The Respondent complains that it could not have possibly received a fair hearing because of a comment I made to the Respondent's counsel, prior to hearing, that

I considered the Respondent "guilty" of the charges raised in these proceedings. Assuming that such a statement was made, the courts have held that an administrative hearing officer who has expressed an opinion as to whether certain types of conduct were prohibited by law, prior to hearing, does not give rise to a valid objection on grounds of due process, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1948). In that case the court held:

> (n)o decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he has expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions of both law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court. *Id.* at 702-3.

While I declined to testify during these proceedings because I did not consider it appropriate for me to give testimony in my capacity as a hearing officer, I did, consistent with the view of at least two Justices in *Board of Trustees, Laramie County School District No. 1 v. Spiegel*, 549 P.2d 1161 (1976), offer to submit to voir dire on the question of bias, prejudice, or pre-determination, but the Respondent declined to inquire. Under these circumstances it is difficult for me to understand how the question of bias can now be raised by Respondent.

Having rendered findings of fact, I make the following conclusions of law:

(1) AFCIA is transacting the business of insurance in Wyoming, as defined by W.S. 26.1-10, and if it elects to

continue transacting business in Wyoming, it must obtain a certificate of authority as required by W.S. 26.1-50. Until a determination is made as to the constitutionality of W.S. 26.1-80(a), the Respondent is liable to the State of Wyoming for payment of premium tax, as required by 26.1-80(a).

(2) The United States has not assumed exclusive jurisdiction over the Wyoming activities of AFCIA, thereby preempting state regulation and taxation, nor is the State of Wyoming obligated to accord full faith and credit to the Kansas Cession Act of 1875.

(3) AFCIA is not exempt from the requirement that it must obtain a certificate of authority by the provisions of W.S. 26.1-51(b), on the basis that AFCIA is not transacting new business in Wyoming.

(4) AFCIA is not exempt from state regulation and taxation on the basis that it qualifies as a fraternal benefit society, as defined by W.S. 26.1-620(a).

(5) The Department of Insurance has not violated the provisions of W.S. 9-276.32 in its investigation and prosecution of this case.

(6) AFCIA has not been deprived of due process of law because the Commissioner of Insurance presided over proceedings initiated by members of the Wyoming Insurance Department, nor was it deprived of any constitutional guarantees on the basis of bias, prejudice, or pre-determination.

IT IS THEREFORE ORDERED

(1) That a civil penalty in the amount of five thousand dollars ($5,000.00) be and is hereby assessed against Armed Forces Cooperative Insuring Association, hereinafter referred to as the Respondent; further

(2) that Respondent, within thirty days hereof, shall compute and submit to the Wyoming Insurance Department a true statement of insurance premium received for insurance coverages afforded upon Wyoming risks during the calendar year 1975, together with payment of the sum of two and one-half per cent in premium tax as required by W.S. 26.1-80(a); further

(3) that Respondent shall forthwith cease and desist from the further transaction of insurance in Wyoming, including the collection or receipt of insurance premiums upon risks located within the State of Wyoming until such time as it shall have secured from the Wyoming Insurance Department a certificate of authority in accordance with W.S. 26.1-50. Policies now in force insuring risks within the State of Wyoming may remain in effect, at the option of the insured, only until the next anniversary date if the Respondent has not first obtained a valid certificate of authority.

Dated this 27th day of December, 1976

/s/ John T. Langdon
John T. Langdon
Insurance Commissioner

APPENDIX E

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1980

No. 5274

ARMED FORCES COOPERATIVE
INSURING ASSOCIATION,
Appellant (Petitioner),

v.

DEPARTMENT OF INSURANCE,
STATE OF WYOMING,
Appellee (Respondent).

ORDER DENYING PETITION FOR REHEARING

(Filed February 19, 1981)

It having been carefully considered, it is

ORDERED that appellant's Petition for Rehearing be and is denied.

February 19, 1981.

By the Court:

/s/ R. R. Rose, Jr.
R. R. Rose, Jr.
Chief Justice

APPENDIX F

MANDATE ON AFFIRMANCE

(Filed February 28, 1981)

IN THE SUPREME COURT)
OF THE)
STATE OF WYOMING)

To the Honorable the District Court of the County of Laramie, Greeting:

Whereas, Armed Forces Cooperative Insuring Association on the 18th day of March, A. D. 1980, filed a record on appeal in the Supreme Court of the State of Wyoming to obtain the reversal of a judgment rendered by you on the 22nd day of January, A. D. 1980, and entered on the 24th day of January, A. D. 1980, in a cause pending before you wherein Armed Forces Cooperative Insuring Association was petitioner-appellant and Department of Insurance, State of Wyoming, was respondent-appellee; and

Whereas, The following proceedings were had and entered in the Supreme Court in said cause on the 31st day of December, A. D. 1980, to-wit:

"This cause having been heretofore taken under advisement, the court, being now fully apprised in the matter, does say and find there is no reversible error in the record of the proceedings of the District Court of Laramie County.

"It is therefore ordered and adjudged for the reasons stated in the opinion herein this day delivered and filed that the judgment of the said district court be, and the same is hereby, affirmed.

"It is further ordered that the costs of this appeal be taxed against the appellant, and the court does certify there was reasonable cause for the appeal."

COSTS IN THE SUPREME COURT: Brief of appellee, $51.75.

Now, Therefore, You are commanded without delay to carry into execution and effect the judgment so as aforesaid rendered by you, in the manner provided by law.

Witness, The Honorable Robert R. Rose, Jr., Chief Justice of said Supreme Court, and the Seal thereof, at Cheyenne, this 20th day of February, A. D. 1981.

/s/ Rita M. White
Clerk.

[Seal]

APPENDIX G

IN THE SUPREME COURT
STATE OF WYOMING

No. 5274

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
Appellant,

vs.

DEPARTMENT OF INSURANCE, STATE OF WYOMING,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed March 17, 1981 With Both Supreme Court of Wyoming and District Court of Laramie County, Wyoming)

1. Notice is hereby given that Armed Forces Cooperative Insuring Association, the above named Appellant, hereby appeals to the Supreme Court of the United States from the final judgment and decision entered in this action on December 31, 1980 by the Supreme Court of Wyoming (from which Appellant timely filed petition for rehearing which was denied by the Supreme Court of Wyoming February 19, 1981) affirming judgment of the District Court of Laramie County, Wyoming, First Judicial District, entered January 22, 1980, affirming decision and order of the Department of Insurance, State of Wyoming entered December 27, 1976.

2. This appeal is taken pursuant to 28 U.S.C. Sections 1257 and 2101 (c).

Dated this 16th day of March 1981.

/s/ James Clifford Logan
James Clifford Logan
James C. Logan & Associates
1010 Waltower, 823 Walnut
Kansas City, Missouri 64106
(816) 842-7755
Attorney for Appellant

Guy, Williams, White & Argeris
P.O. Box 568
1600 VanLennen
Cheyenne, Wyoming 82001
(307) 634-2184
Wyoming Counsel for Appellant

CERTIFICATE OF SERVICE

I, James Clifford Logan, a member of the Bar of the Supreme Court of the United States, hereby certify that I served the foregoing Notice of Appeal on all parties to this proceeding in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States by depositing such Notice of Appeal in a United States mailbox, with first-class postage prepaid, addressed to counsel of record as follows:

On Appellee Department of Insurance, State of Wyoming:

To: Hon. John D. Troughton, Attorney General,
Hon. Gerald A. Stack, Deputy Attorney General,
Hon. Samuel A. Soulé, Senior Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

On Amicus Curiae Arthur A. Aparicio, Jr.:

To: Franklin J. Smith, Esquire
420 Hynds Building
Cheyenne, Wyoming 82001

Dated: March 16, 1981.

/s/ James Clifford Logan
James Clifford Logan

APPENDIX H

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 8:

The Congress shall have power:

(1) To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;

(3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

(11) To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

(12) To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

(13) To provide and maintain a navy;

(14) To make rules for the government and regulation of the land and naval forces;

(15) To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

(17) To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress become the seat of the government of the United States and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall

be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; and

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Article I, Section 10

No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, . . .

Article IV, Section 1

Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Article IV, Section 3, Clause 2

. . . The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

Article IV, Section 4

The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence.

Article VI, Clause 2

> . . . This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Fifth Amendment

> No person shall . . . nor be deprived of life, liberty or property without due process of law; . . . .

Fourteenth Amendment

> . . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

KANSAS CESSION ACT OF 1875

Kansas Statutes, Chapter 27 provides as follows:

27-104. Fort Leavenworth Reservation. Laws 1875, Chapter 66, Section 1, included by reference. (The title to the act is as follows: "An act to cede jurisdiction to the United States over the territory of Fort Leavenworth military reservation." The general provisions of the act are covered by the first (*) section of this article.)

*See 27-101 as reenacted, also 27-102.

27-101. Consent given to the United States to acquire land. That the consent of the State of Kansas is hereby given in accordance with the provisions of Paragraph number seventeen, Section eight, Article one of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation or otherwise, of any land in the State of Kansas, which has been, or may hereafter be, acquired for custom houses, courthouses, post offices, national cemeteries, arsenals, or other public buildings, or for other purposes of the government of the United States. Source of prior law: R.S. 1923, 27-101.

27-102. Jurisdiction. That exclusive jurisdiction over and within any lands so acquired by the United States shall be, and the same is hereby ceded to the United States, for all purposes; saving, however, to the State of Kansas the right to serve therein any civil or criminal process issued under the authority of the state, in any action on account of rights ac-

quired, obligations incurred or crimes committed in said state, but outside the boundaries of such land; and saving further to said state the right to tax the property and franchises of any railroad, bridge or other corporations within the boundaries of such lands; but the jurisdiction hereby ceded shall not continue after the United States shall cease to own said lands.

27-102a. Exemption from taxation. That the jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to said lands; and as long as said lands shall remain the property of the United States, the same shall be exempt from all state, county and municipal taxes.

APPENDIX J

PERTINENT PROVISIONS OF WYOMING INSURANCE CODE

§ 26-1-110. "Transacting insurance" defined.

(a) In addition to other aspects of insurance operations to which provisions of this code by their terms apply, "transact" with respect to a business of insurance includes any of the following:

(i) Solicitation or inducement;

(ii) Negotiations;

(iii) Effectuation of a contract of insurance;

(iv) Transaction of matters subsequent to effectuation and arising out of such a contract.

§ 26-1-111. Complaince with insurance code required.

No person shall transact a business of insurance in Wyoming, or relative to a subject of insurance resident, located or to be performed in Wyoming, without complying with the applicable provisions of this code.

§ 26-2-110. Rules and Regulations.

(a) *Promulgation.*—Subject to and in accordance with the requirements of the Wyoming Administrative Procedure Act [§§ 9-4-101 to 9-4-115], the commissioner may make reasonable rules and regulations necessary for or as an aid to the effectuation of any provision of this code. No such rule or regulation shall extend, modify, or conflict with any law of this state or the reasonable implications thereof.

(b) *Petition.*—Any interested person may petition the commissioner requesting the promulgation, amendment or repeal of any rule or regulation, under the applicable procedures of the Wyoming Administrative Procedure Act.

(c) *Violations.*—In addition to any other penalty provided, willful violation of any such rule or regulation shall subject the violator to such suspension or revocation of certificate of authority or license as may be applicable under this code for violation of the provision to which such rule or regulation relates; but no penalty shall apply to any act done or omitted in good faith in conformity with any such rule or regulation, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

§ 26-2-111. Orders and notices of commissioner.

(a) *To be written and signed.*—Orders and notices of the commissioner shall be effective only when in writing signed by him or by his authority.

(b) *Contents.*—Except as otherwise expressly provided by law as to particular orders, every order of the commissioner shall state its effective date, and shall concisely state:

(i) Its intent or purpose;

(ii) The grounds on which based;

(iii) The provisions of this code pursuant to which action is so taken or proposed to be taken; but failure to so designate a particular provision shall not deprive the commissioner of the right to rely thereon.

(c) *Delivery.*—Except as may be provided as to particular procedures, an order or notice may be given

by delivery to the person to be ordered or notified or by mailing it, postage prepaid, addressed to him at his principal place of business or residence as last of record in the department. Such order or notice shall be deemed to have been given when so mailed.

§ 26-2-112. Enforcement of code and orders; injunctions; penalty for violation of orders.

(a) *Injunctions.*—The commissioner, upon the advice of and through the attorney general, may invoke the aid of the courts through injunction or other proper process, mandatory or otherwise, to enforce any proper order made by him or action taken by him.

(b) *Assistance of attorney general and county attorneys.*—If the commissioner has reason to believe that any person has violated any provision of this code, or any provision of other law as applicable to insurance operations, for which criminal prosecution is provided and would be in order, he shall give the information relative thereto to the attorney general or to the county attorney of the county having jurisdiction of such violation. The attorney general or county attorney shall promptly institute such action or proceedings against such person as in his opinion the information may require or justify.

(c) *Violations of orders.*—In addition to any other applicable penalty, any person who violates a lawful order of the commissioner shall upon proof thereof to the satisfaction of the court, forfeit and pay to the state of Wyoming a sum not to exceed one thousand dollars ($1,000.00), or, if such violation is found to be willful, a sum not to exceed two thousand dollars ($2,000.00). Any such penalty may be recovered in a civil action against the violator.

§ 26-2-116. Examination of insurers.

(a) *Required; frequency; scope.*—For the purpose of determining financial condition, ability to fulfill and manner of fulfillment of its obligations, the nature of its operations and compliance with law, the commissioner shall examine the affairs, transactions, accounts, records and assets of each authorized insurer as often as he deems advisable. He shall so examine each domestic insurer not less frequently than every three (3) years. Examination of a reciprocal insurer may include examination of its attorney-in-fact as to its transactions relating to the insurer. Examination of an alien insurer may be limited to its insurance transactions and affairs in the United States, except as the commissioner otherwise requires.

(b) *Applicants for initial certificate.*—The commissioner shall in like manner examine each insurer applying for an initial certificate of authority to transact insurance in this state.

(c) *Out-of-state examinations.*—In lieu of making his own examination, the commissioner may, in his discretion, accept a full report of the last recent examination of a foreign insurer certified to by the insurance supervisory official of another state.

§ 26-2-118. Examinations generally.

(a) *To be fair, etc.*—Each such examination shall be expeditious, fair and impartial.

(b) *Questioning under oath.*—Upon any such examination the commissioner or examiner may examine under oath any officer, agent, or other individual believed to have material information regarding the affairs under examination.

(c) *Documents, etc., to be made available.*—Every person being examined, its officers, attorneys, employees, agents and representatives shall make freely available to the commissioner or his examiners the accounts, records, documents, files, information, assets and matters in his possession or control relating to the subject of the examination and shall facilitate the examination.

(d) *Correction of inaccurate records and accounts.*—If the commissioner or examiner finds any accounts or records to be inadequate, or inadequately kept or posted, he may employ experts to reconstruct, rewrite, post or balance them at the expense of the person being examined if such person has failed to maintain, complete or correct such records or accounting after the commissioner or examiner has given him written notice and a reasonable opportunity to do so.

(e) *Consent for removal of records, etc.*—Neither the commissioner nor any examiner shall remove any record, account, document, file or other property of the person being examined from the offices or place of such person except with the written consent of such person in advance of such removal or pursuant to an order of court duly obtained. This provision shall not be deemed to affect the making and removal of copies or abstracts of any such record, account, document, or file.

§ 26-2-119. Appraisal of persons being examined.

(a) *Appraisers.*—If the commissioner deems it necessary to value any asset involved in such an examination, he may make written request of the person being examined to appoint one (1) or more appraisers who by reason of education, experience or special training, and disinterest, are competent to appraise the asset. Selection of any such appraiser shall be subject to the written

approval of the commissioner. If no such appointment is made within ten (10) days after the request therefor was delivered to such person, the commissioner may appoint the appraiser or appraisers.

(b) *Copies of appraisal.*—Any such appraisal shall be expeditiously made, and a copy thereof furnished to the commissioner and to the person being examined.

(c) *Expense.*—The reasonable expense of the appraisal shall be borne by the person being examined.

§ 26-2-122. Examination expense.

(a) *By whom to be borne; what included.*—The reasonable and proper expense of examination of an insurer, or of any person referred to in subsections (b) (management or control of an insurer under contract) or (d) (promoters, etc.) of section 26.1-33 [§ 26-2-117 (a) (ii) and (iv)] shall be borne by the person examined. Such expense shall include the reasonable and proper expenses of the commissioner and his examiners, and a reasonable per diem as to such examiners, as necessarily incurred in the examination.

(b) *Payment.*—Such person examined shall promptly pay the examination expense upon presentation by the commissioner of a reasonably detailed written account thereof. A copy of such account shall be filed by the commissioner in the department as a public record. The commissioner shall promptly deposit all such funds with the state treasurer for credit to the general fund.

§ 26-2-125. Commissioner's hearings generally.

(a) *Authorized.*—The commissioner may hold a hearing without request by others, for any purpose within the scope of this code.

(b) *Grounds.*—The commissioner shall hold a hearing:

(i) If required by any provision of this code or of the Wyoming Administrative Procedure Act [§§ 9-4-101 to 9-4-115]; or

(ii) Upon written request for a hearing by a person aggrieved by any act, threatened act or failure of the commissioner to act, or by any report, rule, regulation or order of the commissioner (other than an order for the holding of a hearing, or an order on a hearing or pursuant to such order, of which hearing such person had notice).

§ 26-2-126. Notice of hearing.

(a) *When and to whom given.*—Except where a longer period is expressly provided in this code, the commissioner shall give written notice of the hearing not less than ten (10) days in advance. If the persons to be given notice are not specified in the provision pursuant to which the hearing is held, the commissioner shall give such notice to all persons whose pecuniary interests are to be directly and immediately affected by the hearing.

(b) *Notice to show cause.*—If any person is entitled to a hearing by any provision of law before any proposed action is taken, the notice of the hearing may be in the form of a notice to show cause stating that the proposed action may be taken unless such person shows cause at a hearing to be held as specified in the notice why the proposed action should not be taken, and stating the basis of the proposed action.

(c) *How given; form.*—Notice of hearing shall otherwise be in the form and be given in the manner provided

as to contested cases by section 7 [§ 9-4-107] of the Wyoming Administrative Procedure Act (ch. 108, Laws of 1965); except that mailed notice shall be deemed to have been served when addressed to the person to be notified at his address last of record with the department and deposited, postage paid, in a mail depository of the United States post office.

§ 26-2-127. Hearing procedure.

(a) *Rights of parties.*—The commissioner shall allow any party to the hearing to appear in person and by counsel, to be present during the giving of all evidence, to have a reasonable opportunity to inspect all documentary and other evidence and examine and cross-examine witnesses, to present evidence in support of his interest and to have subpoenas issued by the commissioner to compel attendance of witnesses and production of evidence in his behalf.

(b) *Party by intervention.*—Upon good cause shown the commissioner shall permit to become a party to the hearing by intervention, if timely, only such persons as were not original parties thereto and whose pecuniary interests are to be directly and immediately affected by the commissioner's order made upon the hearing.

(c) *How conducted.*—Hearings shall in other respects be conducted and be subject to the same provisions as to powers, rights and obligations of the commissioner and other persons as provided under the Wyoming Administrative Procedure Act [§§ 9-4-101 to 9-4-115] as to contested cases.

§ 26-3-105. Certificate of authority required.

(a) No person shall act as an insurer and no insurer shall transact insurance in this state except as authorized

by a subsisting certificate of authority granted to it by the commissioner, except as to such transactions as are expressly otherwise provided in this code.

(b) No insurer shall from offices or by personnel or facilities located in this state solicit insurance applications or otherwise transact insurance in another state or country unless it holds a subsisting certificate of authority granted to it by the commissioner authorizing it to transact the same kind or kinds of insurance in this state.

§ 26-3-109. Qualification of new foreign insurers.

(a) No foreign insurer is authorized to transact insurance in Wyoming which has not been issuing its own policies as an authorized insurer for at least two (2) years in its state or country of domicile, unless the insurer is otherwise qualified for a certificate of authority under this code and is:

(i) The wholly owned subsidiary of an insurer which is already an authorized insurer in Wyoming;

(ii) The successor in interest through statutory merger or statutory consolidation, or through bulk reinsurance of substantially all of the insurance risks in this state, of an authorized insurer; or

(iii) An insurer organized solely for the purpose of insuring against earthquake, flood, nuclear radiation, war or other special hazards to property or liability for which, in the opinion of the commissioner, adequate provision is not made by insurers already authorized in this state.

(b) No foreign insurer shall continue to hold a certificate of authority according to the provisions of W.S. 26.1-63 [§ 26-3-118] if the insurer has reinsured substantially all of its insurance risks either prior to, contemporaneously

with or after being acquired by another insurer not holding a subsisting certificate of authority in this state.

§ 26-3-116. Application for certificate of authority.

(a) To apply for an original certificate of authority an insurer shall file with the commissioner its application therefor, accompanied by the applicable fees specified in W.S. 26.1-78 [§ 26-4-101], stating under oath of the president or vice-president or other chief officer and the secretary of the insurer, or of the attorney-in-fact if the insurer is a reciprocal insurer, the insurer's name, location of its home office or principal office in the United States (if an alien insurer), the kinds of insurance to be transacted, date of organization or incorporation, form of organization, state or country of domicile and such additional information as the commissioner may reasonably require, together with the following documents, as applicable:

(i) If a corporation, a copy of its charter or articles of incorporation together with all amendments thereto, or as restated and amended under the laws of its state or country of domicile, currently certified by the public official with whom the originals are on file in such state or country;

(ii) If a domestic incorporated insurer or a mutual insurer, a copy of its bylaws, certified by the insurer's corporate secretary;

(iii) If a reciprocal insurer, a copy of the power of attorney of its attorney-in-fact, certified by the attorney-in-fact; and if a dometic reciprocal insurer, the declaration provided for in section 26.1-565 (b) [§ 26-32-108 (b)];

(iv) A complete copy of its financial statement as of not earlier than the December 31 next preceding

in "convention" form as customarily used in the United States by like insurers, sworn to by a least two (2) executive officers of the insurer or certified by the public insurance supervisory official of the insurer's state of domicile or of entry into the United States (if an alien insurer);

(v) A copy of the report of last examination made of the insurer as of a date within not more than the eighteen (18) months next preceding, certified by the public insurance supervisory official of the insurer's state of domicile or of entry into the United States (if an alien insurer);

(vi) Acceptance of the constitution of the state of Wyoming, upon a form as furnished for the purpose by the commissioner;

(vii) Appointment of the commissioner pursuant to section 26.1-70 [§ 26-3-125], as its attorney to receive service of legal process;

(viii) If a foreign insurer, a certificate of the public insurance supervisory official of its state or country of domicile showing that it is authorized to transact in such state or country the kind or kinds of insurance proposed to be transacted in this state;

(ix) If a foreign insurer, certificate as to deposit if to be tendered pursuant to section 26.1-60 (b) [§ 26-3-115 (b)];

(x) If an alien insurer, a copy of the appointment and authority of its United States manager, certified by its officer having custody of its records;

(xi) If a life or disability insurer, a copy of the insurer's rate book and of each form of policy currently proposed to be issued in this state;

(xii) Designation by the insurer of its officer or representative authorized to appoint and remove its agents in this state.

§ 26-3-130. Countersigning agents; required; commission; designation of resident agent.

(a) *Required.*—Except as provided in section 26.1-75 [§ 26-3-131], no authorized insurer shall make, write, place or cause to be made, or place any policy, duplicate policy, or contract of insurance of any kind, upon persons, property or risks resident or located in this state, except through its duly appointed and licensed agents residents of this state and any one (1) of whom shall countersign the same.

(b) *Commission generally.*—The insurer shall pay to the countersigning agent a commission of not less than five percent (5%) of the entire premium, when paid, on such policy or contract, or twenty-five percent (25%) of the total commission, when paid, whichever amount is lesser. This provision shall not be deemed to prohibit payment by the insurer and receipt by the agent of a larger commission for services performed or to be performed in relation to the policy or contract, if so agreed between the agent and the insurer.

(c) *Commission when property, etc., located outside state.*—Where the policy or contract also covers property or risks located outside Wyoming, only that portion of the premium reasonably apportioned to Wyoming coverages shall be subject to the countersignature commission provided for in (b) above.

(d) *Countersigning by licensed resident agent.*—Where two (2) or more insurers jointly issued a single policy, the policy may be countersigned, on behalf of all

insurers appearing thereon, by a licensed agent resident in this state of any one (1) such insurer.

(e) *Designation of resident agent.*—The insurer shall in each instance designate the resident agent who is to countersign the policy or contract as hereinabove provided.

§ 26-4-103. Premium taxes; generally.

(a) *Report to commissioner.*—Each authorized insurer and each formerly authorized insurer shall file with the commissioner on or before March 1 each year a report in form as prescribed by the commissioner showing (except with respect to wet marine and transportation insurance as defined in section 26.1-89 [§ 26-5-107]) total direct premium income including policy, membership and other fees, and all other considerations for insurance and annuity contracts, whether designated as premium or otherwise, and in whatever form received by it during the next preceding calendar year on account of policies and contracts covering property, subjects, or risks located, resident, or to be performed in this state (with proper proportionate allocation of premiums or consideration as to such persons, property, subjects, or risks in this state insured or covered under policies or contracts covering persons, property, subjects, or risks located or resident in more than one (1) state), after deducting from such total direct premium income (i) the amount of return premiums on cancelled policies (but not including the return of cash surrender values on life policies or annuity contracts), (ii) the amount returned to policyholders as current dividends, and (iii) as to domestic title insurers, that portion of the premium chargeable to title search and examination services as reasonably determined by the commissioner. For good cause shown by the insurer, the commissioner may, in

his discretion, extend for not over thirty (30) days the period within which such report shall be filed.

(b) *Computation and payment of tax.*—Coincidentally with the filing of such report each such insurer shall pay to the state treasurer through the commissioner, for the privilege of transacting business in this state, a tax upon such net premiums and net considerations, such tax to be computed thereon at the following rates:

(i) As to foreign and alien insurers, the rate of tax shall be two and one-half percent (2½%), except as to annuity considerations, and except as provided in section 26.1-81 [§ 26-4-104];

(ii) As to domestic insurers, the rate of tax shall be one and one-half percent (1½%) except as to annuity considerations, and except as provided in section 26.1-81 [§ 26-4-104];

(iii) As to annuity considerations, the rate of tax shall be one percent (1%), except as provided in section 26.1-81 [§ 26-4-104].

§ 26-32-109. Certificate of authority generally.

(a) *Issuance.*—The certificate of authority of a reciprocal insurer shall be issued to its attorney in the name of the insurer.

(b) *Refusal, suspension, etc.*—The commissioner may refuse, suspend or revoke the certificate of authority, in addition to other grounds therefor, for failure of the attorney to comply with any provision of this code.

APPENDIX K

SUMMARY OF PROVISIONS OF NAIC EXAMINER'S HANDBOOK

Chief Examiner Power of the Wyoming Department of Insurance testified at the District Court hearing May 8, 1978 that the NAIC Examiner's Handbook (received as Appellant's Exhibit C) used by appellee, but not disclosed at the Administrative Hearing held November 18, 1976, is so vast and detailed that after using it for ten years "I still don't know all of it" (D 13). The "Financial Condition Handbook" portion thereof is used by Wyoming in examining all insurance companies (D 20). The "Market Conduct Handbook" portion deals with examining matters of all insurers' treatment of policyholders, approval of various policies, rates and cancellation procedures (D 21). All examinations would take place at Fort Leavenworth where Wyoming would send its examiners and follow procedures of the Handbook (D 16). The Wyoming Insurance Code, W.S. 26, is the bible (D 19) and the Handbook (Exhibit C) is the guide to ascertain compliance (D 15). Wyoming has a Chief Examiner and a staff of other examiners (D 15). (Numerals in parentheses following "D" refer to page of the Record of Proceedings May 9, 1978 found in R. Vol. II.)

The NAIC handbook is the official guide comprising methods used by appellant to ascertain compliance with the Wyoming Insurance Code, which as construed by appellee and the Courts are fully authorized by such Code (26-2-110).

This large loose-leaf handbook of forms and instruction costing $55 per copy entitled "National Association of Insurance Commissioners Examiners Handbook" contain-

ing the (1) Financial Condition Examiners Handbook (FCEH) and (2) Market Conduct Examination Handbook (MCEH) both comprising Appellant's Exhibit C is placed in the hands of each staff member of appellee, to which this Court's personal examination is particularly invited. A team of insurance examiners is required by W.S. 26-4-103 to be sent to each insurer periodically as frequently as the Commissioner desires, followed by their detailed exhaustive reports on the content and extent to which the insurer is complying with the rules and regulations therein prescribed, to which the insurer is required to conform under pain of losing its certificate of authority from each state in which it is qualified. A copy of such report is sent to NAIC and all states in which it is qualified. A bit of arithmetical calculation shows that the expense of each such examination varies in range from several thousand dollars in the case of an insurer whose policyholders are confined to a single state up to possibly a hundred thousand dollars (or more in rare instances) when policyholders are nationwide. NAIC sets forth a schedule of daily rates proposed to be charged the insurer for regulatory services of each member of the team, ranging from $70 for Junior Examiners to $102 for Senior Examiners plus a $35 per diem expense allowance for each (Ex. C at p. 287). Since Wyoming is the sole state presently seeking to regulate AFCIA, the Wyoming Commissioner and/or his staff would come to the federal enclave for extended periodic visits of months at a time for which AFCIA would be charged fees *many times the amount of premiums* now potentially collectable from its fewer than a hundred members in Wyoming, causing such premiums to be escalated beyond practicality.

The detailed control and regulation of AFCIA which the Commissioner would exercise is so complete as to

interfere with AFCIA's executive committee of Army Colonels in its regulatory responsibilities. Regulatory supervision by the Federal Trade Commission would likewise be superseded by the Commissioner contrary to federal statutes. The outreach of such regulation by the Wyoming Commissioner extends to every conceivable minute function of AFCIA on the federal enclave, of which the following comprise a partial list categorized under separate headings "Financial Condition System" and "Market Conduct System", each governed by separate multiplicities of regulations also included in Exhibit C. The former focuses on financial and corporate matters and the latter on sales, advertising, rating and claims (Ex. C, FCEH at p. 9). There is also an examination of reinsurance, especially applicable to AFCIA since 100% of its homeowner coverage is fully reinsured with Continental Insurance Companies, already licensed in Wyoming. A further provision is for on-the-job training for novices to become full-fledged examiners at appellant's expense (Ex. C, FCEH at p. 12). The team of examiners is supervised by the examiner-in-charge who keeps track of actual man-days spent by each team member on each examination activity (Ex. C, FCEH at p. 13). A hierarchy is set up within the team (Ex. C, FCEH at p. 287) comprising the Examiner-in-Charge, Senior Examiners 1, 2, and 3, Examiners 1, 2, and 3, Junior Examiners 1, 2, and 3, and persons undergoing on-the-job training.

A detailed report on the insurer is prepared by the team including table of contents, company history, management and control, corporate records, fidelity bonds and other insurance, officers, employees' and agents' welfare and pension plans, territory and plan of operation, market conduct activities, policy forms, underwriting practices, rating and statistical reporting, treatment of policyholders, growth, business in force by states, mortality and loss experience, reinsurance, accounts and records, financial

statements, assets and liabilitiies, operations, supporting schedules and exhibits deemed desirable, reconciliation of surplus, analysis of changes in financial statements, discussion of adverse findings which is said largely to determine the size of the report (Ex. C, FCEH at pp. 15-16).

"Post Examination Follow-up Procedures" are provided for corrective action, and insufficient corrective action "should be cause for consideration of official proceedings against the directors and officers" (Ex. C, FCEH at p. 17). The Wyoming Commissioner is authorized to proceed individually against the five senior military officers and other officers on the federal enclave should he be displeased with their performance of duty irrespective of whether such disciplinary action would displace military courts martial proceedings.

An important part of the examination covers premium revenues to be "checked for proper distribution to states" and includes taxes, licenses and fees (Ex. C, FCEH at p. 38). If the examining team believes additional taxes and fees should be paid to any of the other 49 states and licenses procured, such would be reported, even though only Wyoming is presently contending for state taxes and regulation.

Appellant's 88,989 policyholder accounts and 188,753 policies would be separated into three classes for examination (Ex. C, FCEH at p. 25).

Minute examinations are required of the insurer's bonds, mortgages, stocks, policy loans, cash, real estate, policy reserves and policy claims (Ex. C, FCEH at p. 29). There is a thorough review of all audits, reports and CPA working papers, SEC reports, IRS returns and audits, and internal audits (Ex. C, FCEH at p. 30). Computerized accounting systems such as those of AFCIA are recognized as "special problems" and examiner on-the-job training

must be provided members of the team at AFCIA's expense (Ex. C, FCEH at pp. 31-32).

Search is made for transactions or procedures "difficult to understand, unfamiliar or unusual" (Ex. C, FCEH at p. 33). Discussions are held with officers, department heads and supervisors "regarding systems, kinds of business transacted, branch offices, personnel, expenses, etc." and "each query should be carefully and persistently followed" (Ex. C, FCEH at p. 33). Detailed working papers are maintained by each of the Wyoming Commissioner's team concerning work done, conclusions drawn and supporting data gathered (Ex. C, FCEH at p. 33). Special attention is given bearer bonds and registered securities, policyholder dividends, contract claims, proper expense allocation, premium revenues, contingency reserves, investment reserves, reserves for change in valuation basis and uniform accounting procedures (Ex. C, FCEH at pp. 37-39).

An elaborate and minute Internal Controls Questionnaire (Ex. C, FCEH, at pp. 45-70) is provided covering minutiae of all in-house practices, procedures and physical facilities at Fort Leavenworth and are grouped under the following captions: Bonds and Stocks, Mortgage Loans on Real Estate, Real Estate, Collateral Loans, Cash on Hand and on Deposit, General Expenses Due or Accrued, Policy Loans, Aggregate Reserve, Policy and Contract Claims, Uncollected Premiums, Bills Receivable Taken for Premiums, Loss Reserves—Property and Liability, Unearned Premiums, Management Controls, Organization Controls, System and Program Development, Operations, Hardware and Software, Programming, Proprietary Software, Major Applications, Processing Controls, Documentation, Outside Service Center Controls.

A parallel examination procedure is prescribed for the comprehensive Market Conduct Examination in the

Market Conduct Examination Handbook (MCEH) of Exhibit C, covering all facets of sales and advertising, underwriting, rating, and claims. For such examination the Commissioner relies on financial examiners, information developed by staff members who process complaints, who review and approve rates and policy forms and who regulate agents and brokers. "The Commissioner will then decide what action, if any, is appropriate." (Ex. C, MCEH at p. 5).

Part 3 of the Financial Condition Examiners Handbook (FCEH) of Exhibit C comprises 90 pages of small type prescribing examination procedures for each account. The table of contents indicates the detailed areas of operations covered in minute detail. For example, under Management and Control, the examiners study the charter and bylaws, minutes of policyholders, directors, executive and other committees and determine if inconsistent with the charter and bylaws, checking of proxies and their compliance with laws, rules and regulations, reviewing authorization of salaries and approval of investments, checking profit sharing and bonus plans and whether appropriate insurance is in force and sufficient fidelity bond coverage (Ex. C, FCEH at p. 75). Thus, a legal as well as an accounting audit, examination and review is done. The Commissioner's staff would prepare an organizational chart of the insurer presumably for the purpose of ascertaining whether the Commissioner feels it is properly organized (Ex. C, FCEH at p. 75). One wonders how differences between AFCIA's military oriented organizational charts and what organization the Commissioner might prefer could be resolved. A review of Part 3 clearly indicates that the Commissioner would in effect subordinate the executive committee of senior military officers in their present responsibilitieis to AFCIA to Wyoming state authority over what transpires on AFCIA's portion of the federal enclave. The Wyoming Commissioner would in effect tell senior military officers how to carry out their regulatory functions of AFCIA, becoming their "commanding general".

APPENDIX L

PROVISION OF WYOMING INSURANCE CODE RESPECTING PENALTIES

§ 26-1-115. General criminal and civil penalties.

(a) Each violation of this code for which a greater penalty is not provided by another provision of this code or by other applicable laws of this state, in addition to any applicable prescribed denial, suspension, or revocation of certificate of authority or license, shall be a misdemeanor and shall be punishable upon conviction by a fine of not more than one thousand dollars ($1,000.00), or by imprisonment in the county jail for not more than six (6) months or by both such fine and imprisonment in the discretion of the court. Each instance of such violation shall be considered a separate offense.

(b) Any person who violates any provision of the insurance code, any lawful rule or final order of the commissioner or any final judgment or decree made by any court upon application of the commissioner, shall forfeit and pay a civil penalty in an amount determined by the commissioner of not more than one thousand dollars ($1,000.00) for each offense, or ten thousand dollars ($10,000.00) in the aggregate for all such offenses within any three (3) month period. In the case of individual agents or adjusters, the civil penalty shall be not more than one hundred dollars ($100.00) for each offense or one thousand dollars ($1,000.00) in the aggregate for all such offenses within any three (3) month period. Such penalty shall be collected from the violator and paid by the commissioner, or the appropriate court, to the state treasurer to the credit of the general fund. Before the commissioner

shall impose a civil penalty, he shall give written notice to the person, agent or adjuster, accused of a violation, stating specifically the nature of such alleged violation and fixing a time and place, at least ten (10) days thereafter, when a hearing of the matter shall be held. After such hearing or upon failure of the accused to appear at such hearing, the commissioner shall determine the amount of the civil penalty to be imposed in accordance with the limitations expressed in this subsection. Each violation shall be deemed a separate offense:

(i) Such civil penalty may be recovered in an action brought thereon in the name of the state of Wyoming in any court of appropriate jurisdiction;

(ii) In any court action with respect to a civil penalty, the court may review the penalty as to both liability and reasonableness of amount;

(iii) The provisions of this section are in addition to and not in lieu of any other enforcement provisions contained in the insurance code.

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No. 80-1945

In the

Supreme Court of the United States

OCTOBER TERM, 1981

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
Appellant

v.

DEPARTMENT OF INSURANCE, STATE OF WYOMING

On Appeal From The Supreme Court Of Wyoming

APPELLANT'S SUPPLEMENTAL BRIEF

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APPELLANT'S SUPPLEMENTAL BRIEF

This supplemental brief is submitted by Appellant Armed Forces Cooperative Insuring Association in response to the intervening *Amicus Curiae* brief filed by the Solicitor General on December 9, 1981.

Appellant takes issue with the Solicitor General's recommendation that the appeal be dismissed. Indeed, Appellant believes that the very arguments set forth in the Solicitor General's brief demonstrate the correctness of Appellant's position that at least two important federal questions are raised in this appeal, and that the decision below by the Supreme Court of Wyoming conflicts with decisions of this Court.

The critical federal questions raised in this appeal are:

First, whether Appellant, by virtue of its recognition and support by the federal government and its intimate connection with governmental activity, constitutes a federal instrumentality or whether, as the Wyoming court and the Solicitor General contend — but as this Court has never held — to be a federal instrumentality an organization must be established by a specific statute or regulation.

Second, whether this Court's decision in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962) — holding that, under

the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, no state may tax or regulate insurance contracts entered into outside its jurisdiction based merely on the presence of insured persons or property within the state — still represents valid law, or whether, as the Wyoming court and the Solicitor General contend, the presence of the insured and his insured property in a state permit that state to regulate and tax the out-of-state insurer.

We discuss each of these questions, and respond to the Solicitor General's comments, below.

I. Appellant Is A Federal Instrumentality And It Must Be Held Immune From State Regulation And Taxation

The Solicitor General contends that Appellant is not a federal instrumentality — and suggests that this Court dispense with the appeal — on one ground: Appellant was not established by a specific statute or regulation. Without that particular type of federal "authorization," the Solicitor General concludes, "there is no basis for concluding that an institution is a federal instrumentality." (Solicitor General's Brief, hereafter "S.G.B.," 9).

But this rule has never before been adopted by this Court. Appellant respectfully submits that the Solicitor General's rigid rule misstates the law and disserves the real interests at stake in this and similar controversies. A fair reading of the case law yields a more sensible and subtle doctrine: to assess the validity of a state effort to tax and/or regulate a federal-related activity, the courts do and should consider all the relevant circumstances and a range of factors. Where, as here, the enterprise is recognized and supported by the federal government, its activities are intimately related to the federal government, its extra-governmental effects and the state's interest in regulating are negligible, and, finally, where state interference will undermine the governmental purpose of the enterprise — then the balance must be struck in favor of immunity.

Indeed, the Solicitor General (S.G.B. 8-9) himself acknowledges that, as this Court ruled in *Department of Employment* v. *United States*, 385 U.S. 355, 358-359 (1966), "[t]here is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality. . . ." Never-

theless, the Solicitor General urges the Court to sanction the Wyoming court's application of a "simple test" in this case. Clearly, this Court has never held or stated that creation by statute or regulation is a *sine qua non* to status as a "federal instrumentality." Rather, the Court has treated the existence of a chartering statute or regulation as merely one of numerous criteria which must be considered in determining whether a particular organization deserves the protection from state taxation and regulation which is afforded to federal instrumentalities.

For example, Justice Marshall, in his dissent in *First Agricultural National Bank of Berkshire County* v. *State Tax Commission*, 392 U.S. 339 (1968), observed that the Court has focused on various factors to determine the status of a specific institution as a federal instrumentality. Such factors include 1) whether it is organized for private profit, 2) whether the government has retained such control over it that it could properly be called a "servant" of the United States in agency terms, 3) whether it is organized to effectuate a specific government program, 4) whether its ownership substantially or totally lies with the government, 5) whether government officials handle and control its operation, 6) whether its officers or any significant portion of them are appointed by the government, 7) whether the government gives it significant financial aid, 8) whether it is charged by law with carrying out some of the government's international commitments, and 9) whether it performs functions indispensable to the workings of a governmental unit. 392 U.S. at 353-354. Interestingly, Justice Marshall did not include in his list the one factor upon which the Wyoming Supreme Court based its entire decision — the necessity of a federal statute or regulation. *See also Standard Oil of California* v. *Johnson*, 316 U.S. 481 (1943) (post exchanges held federal instrumentalities with only passing reference by the Court to statutory recognition of them).

The Courts of Appeals have also applied a practical, multi-factoral approach to determining whether an organization is a federal instrumentality. Recently the Court of Appeals for the District of Columbia Circuit held that the Smithsonian Science Information Exchange, a nonprofit institution incorporated under the laws of the District of Columbia, was a federal instrumentality, although there was no indication in the case that it was created by statute. *Foster* v.

Ripley, 645 F.2d 1142 (D.C. Cir. 1981). *See also United States* v. *Holcombe*, 277 F.2d 143 (4th Cir. 1960) (officers' mess held a federal instrumentality with no reference to any statutory authority for its status); *cf. Kalinski* v. *C.I.R.*, 528 F.2d 969, 973 (1st Cir. 1976) (air force base Child Guidance Center held a federal "agency" for tax purposes, because "The elements of control, with power to initiate and terminate, with effectuation of government purposes paramount over those of organizers and members, and the limitation of membership to government-connected persons, serve to identify an 'agency.' ")[1]

Consideration of the relevant factors and circumstances in the case at bar compels a conclusion that Appellant is a federal instrumentality immune from state taxation or regulation. Apart from its recognition and support by the federal government, and its close involvement with governmental activities, it is plain that exposing Appellant to state taxation and regulation, such as that imposed by Wyoming, would impair and probably completely frustrate the purpose for which Appellant enjoys its federal authorization and support. Since Appellant was first formed at Fort Leavenworth just short of a century

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[1] In addition to emphasizing the absence of explicit statutory or regulatory coverage of Appellant, the Solicitor General also points to the *presence* of Department of Defense and Army regulations on "private organizations." These, it is claimed, include Appellant, and "specifically provide that such private organizations are not instrumentalities of the military department." S.G.B. 9-10, 32 C.F.R. § 212 (1980), AR 210-1 (1974). This, we submit, is not an accurate description of the regulations. Such regulations contain no specific reference to Appellant. They betray no intent to preclude case-by-case inquiries into the status of military-related activities not specified in their provisions. For example, would the Child Guidance Center in the *Kalinski* case, *supra*, be barred by this provision from enjoying instrumentality status vis-a-vis state restrictions on the education of emotionally disturbed children, if it existed at Forth Leavenworth instead of Weisbaden? Such a result would seem unlikely. Yet the *Kalinski* center is not mentioned in the "private organization" regulations, and the Solicitor General's reasoning would seem to preclude such an activity from enjoying instrumentality status. Furthermore, since Appellant is officially recognized within the Department of Defense as a "non-profit military association," it is open to question whether Appellant is a "private organization" under section 212 at all.

ago, that purpose has remained the same — to provide property and (non-auto) casualty insurance coverage to officers in the United States military, specifically tailored to the unique needs of military personnel. Appellant's coverage is inexpensive, comprehensive, uniform across state and national borders, and responsive to the needs of insured military personnel and their families, who must move frequently and upon short notice, and who often leave their possessions in different locations around the world. Equivalent coverage is not available commercially.[2]

Servicemen and women would be deprived of much or all of the benefits of Appellant's service if Appellant were subjected to state regulation and taxation. Appellant's coverages and rates would have to be approved by individual state regulatory authorities and would have to conform to varying state requirements.[3] In at least some instances, this would require Appellant to charge state-determined rates,[4] and to use state-prescribed policy forms.[5] Appellant would have to pay premium taxes, such as the 2½% tax Wyoming seeks to impose, across the country. In addition, even though, as the Solicitor General notes, currently "no salesmen or agents are employed by Appellant and no commissions are paid by it to anyone (S.G.B. 4)," in many states Appellant would have to pay a "minimum commission" on each transaction to a local insurance agent or "attorney."[6]

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[2] For example, servicemen and women must often move with little notice to virtually any point in the United States or abroad; portions of their personal property must frequently be left in more than one spot. To meet this need, Appellant provides world-wide coverage of personal property. It does so with a single policy, with a single, universally applicable rate. Appellant's relations with its insureds are based to a significant extent on trust; most claims are literally paid solely on the word of honor of the insured.

[3] At present, Appellant's coverage and rates are determined by its five-member executive board, all of whom are active duty senior officers at Fort Leavenworth who serve at the pleasure of the Commanding General of Fort Leavenworth. The composition of Appellant's executive board assures that Appellant's insurance will be suitable for the needs of military personnel.

[4] See, e.g. Tex. Ins. Code Ann. art. 5.25, 5.26 (Vernon).

[5] See, e.g., N.Y. Ins. Law, § 168.

[6] See, e.g., Ga. Code Ann. § 817b, Wyo. Stat. § 26-3-130.

Appellant would be required to deposit $800,000 or more with its home state to cover potential claims, and make additional deposits of up to $100,000 each in some other states.[7] Appellant would have to add substantial administrative staff to cope with regulating demands from fifty states. In most states, Wyoming included, Appellant would be liable to be assessed in order to rescue state residents insured by commercial companies that become insolvent.[8]

Plainly, state regulation and taxation would substantially increase Appellant's costs and substantially decrease its ability to serve the special needs of its insureds. These, of course, are the very benefits that motivated its formation and that have sustained its continued authorization and support by the federal government as a non-profit military association.

The Solicitor General asks the court to ignore these factors, and all other factors, except for one — whether there has been a specific chartering statute or regulation. Neither this Court's prior decisions nor sound public policy countenance such a simplistic and rigid approach.

II. This Court's Decision In *Todd Shipyards*, the Fourteenth Amendment and the McCarran-Ferguson Act Bar Wyoming From Taxing Or Regulating Appellant's Activities

Apart from the question of Appellant's federal instrumentality status and the proper standards to be employed in resolving this question, this appeal raises an important question as to the continuing viability, and the scope, of this Court's frequently-cited decision in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962). There the Court held that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, as elucidated by "an explicit, unequivocal statement" in its legislative history, codifies the rule set forth in numerous prior decisions of this Court by foreclosing to the states regulatory and tax jurisdiction over out-of-state insurers where the

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[7] See, e.g., Ga. Code Ann. § 310.

[8] See, e.g., Wyo. Stat. § 26-37-101 *et seq.*

only significant contact with the state is that the insured person and property are located within it. The Court quoted the House Committee Report on McCarran-Ferguson at length (370 U.S. at 455):

> Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court . . . which hold, inter alia, that *a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way*. Id., quoting H.R. Rep. No. 143, 79th Cong., 1st Sess., 3 (Emphasis added.)

The Court added that, since Congress "tailored the [regime under McCarran-Ferguson] for the insurance business with specific reference to our prior decisions . . .", this rule, among others, was placed beyond the power of the judiciary to change. 370 U.S. at 458.

The Wyoming court's decision, holding that the state could exercise regulatory and tax jurisdiction over Appellant, cannot be squared with the rule articulated in *Todd Shipyards*. It is undisputed that all of Appellant's insurance contracts with persons domiciled in Wyoming were entered into outside that state. As set forth in *Todd Shipyards*, the mere fact that insured persons are domiciled in a particular state, or that the covered risks are located within the state, cannot form the basis for state jurisdiction when the insurance contracts were made outside the state.

The Solicitor General's brief tries to confine *Todd Shipyards* to its particular facts by describing it as holding only that state *taxation* (not regulation) is prohibited regarding insurance transactions, where the *only* contact with the taxing state is that the insured *property* is within its borders. (S.G.B. 14). The problem with the Solicitor General's argument is that it ignores what the Court actually said, and what the Court quoted the Congress as having said. First, the Solicitor General's attempt to limit the effects of *Todd Shipyards* to the states' authority to *tax* out-of-state insurers is misguided. As shown above, where the only basis for jurisdiction is the in-state location of the insured property and the insured's residence, Congress provided, and the Court observed, that states may neither tax *nor* "regulate such

transactions in any way." 370 U.S. at 456. Second, the language quoted above makes it clear that a state is precluded from taxing or regulating insurance contracts "entered into outside its jurisdiction," not simply when the sole contact is that the insured property is located in the state, *but also where the insured is "domiciled" within the state*. 370 U.S. at 456.

The Solicitor General further attempts to distinguish *Todd Shipyards* by arguing that ". . . [T]he panoply of contacts between appellant's insurance transactions and the State of Wyoming far exceeded the minimal single contact between the insurance company and the State of Texas in *Todd Shipyards*." (S.G.B. 14-15). But the Solicitor General's "panoply" consists entirely of items that simply reflect the fact that Appellant's insureds are domiciled in Wyoming.[9] Appellant's contacts with Wyoming come down to two facts — it insures property located in Wyoming and persons domiciled in Wyoming. The Solicitor General identifies no additional meaningful contacts because there are none.[10] But that defines precisely the circumstances that *Todd Shipyards* held to put an out-of-state insurer outside the taxing state's jurisdiction.

Insofar as *Todd Shipyards* would bar state regulation of an out-of-state insurer with in-state insureds, the Solicitor General treats that

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[9] Thus, the Solicitor General lists the "panoply" of contacts between Appellant and Wyoming as follows:

> Here, the property insured by appellant was located in Wyoming [as was the case in *Todd Shipyards*, of course], the insurance was issued to Wyoming residents, the applications and premiums were forwarded from Wyoming, the claims and adjustments originated from Wyoming, and payment was made, if not by check or currency forwarded to Wyoming residents, by bank credits of equal value payable on their order. . . . (S.G.B. 14).

Obviously, each component of this "panoply" is simply an essential and innocuous incident of the fact that some of Appellant's insureds live in Wyoming.

[10] Evidently, the Solicitor General did not consider worthy of mention most of the spurious "contacts" identified by the Wyoming Supreme Court in its equally futile effort to distinguish *Todd Shipyards* (J.S. App. 52-53).

case as inconsistent with, and — even though it was decided subsequently — not as close to a correct statement of the law as *Travelers Health Association* v. *Virginia* 339 U.S. 643 (1950). In his brief the two cases appear as ships passing in the night. But the fact is that the two decisions, both of which were written by Justice Douglas, are easily reconciled and demonstrate clearly why Appellant's situation is within the rule of *Todd Shipyards*.

Where, as in *Travelers Health*, out-of-state insurers initiated massive, active efforts to persuade ("sell" in the Solicitor General's terms) a state's citizens to purchase their products, where such insurers maintained in-state sales forces, whether as open agents on commission or (as in *Travelers Health*) as systematically organized promoters who were in effect surrogate sales agent forces, a state could clearly act to protect its residents as consumers. But where, as prescribed by the holding of *Todd Shipyards*, a state's residents are not the targets of such sales campaigns, the mere fact that they happen to live in a state is *not* justification for its regulating their insurer. The Court in *Todd Shipyards* made that distinction clear, and it further made clear its holding that this is a rule fashioned by Congress, not up to the judiciary to change. 370 U.S. at 457.

In this case it is especially clear that *Todd Shipyards* controls, because Appellant's insureds are not ordinary residents of Wyoming. They are in Wyoming on temporary assignment by their military employer. It is more realistic to regard them as participants in a military world, with no set geographic boundaries, than as residents of Wyoming. The military world is the context to which Appellant's service is tailored. It is there — not to Wyoming — where Appellant's insureds have voluntarily turned, by doing business with Appellant, to look for protection and governance. It is utterly unsupportable for Wyoming to invoke their mere temporary residence within its borders as the decisive "contact" justifying its unwanted intervention in their affairs.

CONCLUSION

For the foregoing reasons, Appellant's appeal should be granted.

Respectfully submitted,

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No. 80-1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARMED FORCES COOPERATIVE
INSURING ASSOCIATION,

Appellants,

—vs—

DEPARTMENT OF INSURANCE, STATE OF WYOMING,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF WYOMING

MOTION TO DISMISS OR AFFIRM

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ARMED FORCES COOPERATIVE INSURING ASSOCIATION,

Appellants,

—VS—

DEPARTMENT OF INSURANCE, STATE OF WYOMING,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Wyoming on the grounds that:

(1) The questions raised by the Appellant are so unsubstantial that they do not merit further argument;

(2) The decision of the Wyoming Supreme Court makes it clear that no substantial federal question is raised in this case; and

(3) The decision of the Wyoming Supreme Court rests, in part, on an adequate state basis and therefore it is unnecessary to address the federal issues raised in that argument.

I.
ISSUES INVOLVED AND THE NATURE OF THE CASE.

A. ISSUES.

The Appellant does not challege any Wyoming statutes pertaining to the regulation of insurance on a constitutional basis. Rather Appellant asserts that as applied to it, these statutes offend several principles of constitutional law.

(i) Appellant asserts it is a federal enclave and hence immune from State regulation or taxation.

(ii) Appellant asserts it is a federal instrumentality and therefore is immune from State regulation or taxation.

(iii) Appellant asserts that because it is a "mail order" insurer and has no direct contacts with Wyoming, this State has no jurisdiction. Appellant asserts that the contracts of insurance are entered into beyond the borders of Wyoming and thus are beyond the reach of this State.

(iv) Appellant asserts that because the tax imposed on Appellant is not apportioned, it is in violation of the principles of due process and equal protection.

(v) Finally, Appellant asserts that the Insurance Commissioner's acts with respect to the cancellation of an insurance policy constituted an impairment of contract which offended due process and equal protection principles.

B. PROCEEDINGS BELOW.

On September 15, 1976, a complaint was filed against Appellant alleging that it was conducting the business of insurance in Wyoming without a certificate of authority and had failed to pay a premium tax as required by Wyoming law. As a result of an administrative hearing into that complaint, a $5,000.00 assessment and a 2½% premium tax were levied against Appellant. The decision was appealed to the district court by Appeallant. The district court upheld the action of the Commissioner. Appellant then appealed to the Wyoming Supreme Court which also upheld the Commissioner.

II.

THE ISSUES RAISED IN THE APPELLANT'S JURISDICTIONAL STATEMENT MAKE IT CLEAR THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. UNDER THE McCARRAN-FERGUSON ACT AND GENERAL PRICIPLES OF JURISDICTION, THE STATE OF WYOMING HAS THE AUTHORITY TO REGULATE AFCIA.

The McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, reserves to the several states the power to regulate insurance. The Appellant is an insurance company which sells insurance in Wyoming as well as many other states. Since AFCIA is an insurance company, it is next necessary to determine that it is doing business in the State of Wyoming. The activities which Appellant conducts in Wyoming were determined by the Wyoming Supreme Court to be sufficient to constitute the minimum contacts necessary for Wyoming to assert jurisdiction. *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958), rehearing denied 358 U.S. 858, 79 S. Ct.

10, 3 L.Ed.2d 92; *International Shoe Company v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed.2d (1945); and see *Olmstead v. American Granby Co.*, 565 P.2d 108 (Wyo. 1977). In cases with comparable factual settings, this Court has decided that the sale of insurance by out-of-state companies constitutes the minimum contact necessary to sustain jurisdiction. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 233 (1957); *Travelers Health Association v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L.Ed. 1154 (1950).

In conclusion, it is clear that the Appellant is an insurance company. Moreover, the well-delineated jurisprudence of the U.S. Supreme Court would confer jurisdiction on Wyoming over the Appellant, absent some recognized exception, e.g. immunity because it is a federal instrumentality. Applying these well-delineated principles to the case at bar, it is clear that Wyoming had jurisdiction over AFCIA for the purposes of imposing the $5,000.00 assessment and requiring payment of the premium tax.

B. THE REGULATION WHICH THE STATE OF WYOMING HAS IMPOSED ON AFCIA IS CONSISTENT WITH THE GUIDELINES SET DOWN BY THE U.S. SUPREME COURT.

At the outset it can fairly be said that the states have broad discretion in the regulation of the insurance industry. AFCIA does not differ significantly from many other insurance companies who do business on a national scale.

The power of the states to regulate insurance companies has a long history of development in the U.S. Supreme Court. *Hooper v. California*, 155 U.S. 648, 15 S. Ct. 207, 39 L.Ed. 197 (1895); *Allgeyer v. State of Lousiana*, (1897); *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U.S. 346, 43 S. Ct. 125, 67 L.Ed. 297 (1922); *Connecticut General*

Life Insurance Company v. Johnson, 303 U.S. 77, 58 S. Ct. 436, 82 L.Ed. 673 (1938); *Osborn v. Ozlin*, 310 U.S. 53, 60 S. Ct. 758, 84 L.Ed. 1074 (1940); *Hoopseton Canning Co. v. Cullen*, 318 U.S. 313, 63 S. Ct. 602, 87 L.Ed. 777 (1943); *Travelers Health Association v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L.Ed. 1154 (1950); and *State Board of Insurance v. Todd Shipyards*, 370 U.S. 451, 82 S. Ct. 1380, 8 L.Ed.2d 620 (1962).

After carefully considering the historical background of this issue, the Wyoming Supreme Court concluded that this case was distinguishable factually from those U.S. Supreme Court cases which held against the power of the states to regulate and tax mail order-type operations. See Generally, *People v. United National Life Insurance Company*, 58 Cal. Rptr. 599, 427 P.2d 199 (1967); and *Ministers Life and Casualty Union v. Haase*, 30 Wis.2d 339, 141 N.W.2d 287 (1966), appeal dismissed 385 U.S. 205, 87 S. Ct. 407, 17 L.Ed.2d 301, reh. den. 385 U.S. 1033, 87 S. Ct. 739, 17 L.Ed.2d 681.

When the facts of this case are considered as they are set out in the opinion of the Wyoming Supreme Court (See Jurisdictional Statement, pp. A52-A53) it is clear that no substanitial issue exists as to the jurisdiction of the State of Wyoming to regulate and tax AFCIA. Moreover, it is clear that the regulation and taxation is within the guidelines already established by this Court.

For these reasons the constitutional provisions cited by Appellant are inapplicable when considered in light of the facts of this case.

C. AFCIA IS NOT A FEDERAL ENCLAVE OR A FEDERAL INSTRUMENTALITY AND HENCE IS NOT EXCEPTED FROM REGULATION OR TAXATION FOR THAT REASON.

A federal instrumentality must be created by federal

statutes or federal regulations. *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 316) 429, 4 L.Ed. 579 (1819); *Johnson v. Maryland*, 254 U.S. 51, 41 S. Ct. 16, 65 L.Ed. 126 (1920); *Department of Employment v. United States*, 385 U.S. 355, 87 S. Ct. 464, L.Ed.2d 414 (1966); *Standard Oil Company of California v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 86 L.Ed. 1611 (1942).

AFCIA has no statutory authorization. There is no federal regulation which gives official existence to AFCIA. There are no facts which indicate that AFCIA provides an indispensable function for the federal government. There are no facts which indicate that AFCIA receives substantial assistance from the federal government in any officially authorized manner. Appellant presented no facts that indicated it was itself a federal enclave. Rather, Appellant has its headquarters on a federal enclave. The Wyoming Supreme Court rejected any theory that Appellant could be a federal enclave. The Wyoming Supreme Court carefully reviewed the facts presented by AFCIA in the light of pertinent U.S. Supreme Court case law and found that AFCIA has no claim to immunity based on being a federal instrumentality. (See Jurisdictional Statement pp. A-32-37).

Appellant's assertions that the State of Wyoming is tinkering with and interfering with the Department of Defense establishment is wholly without substance. The State of Wyoming seeks only to ensure that residents of Wyoming, whether military or civilian, are receiving insurance protection that is consistent with the legislative standards which protect insurance consumers.

For these reasons, the constitutional provisions cited by Appellant are not offended by the activities of the Wyoming Insurance Commissioner.

D. THE TAX IMPOSED IS FAIRLY APPORTIONED UNDER CONSTITUTIONAL STANDARDS.

Appellant asserts that Wyoming has not apportioned the premium tax between AFCIA's Wyoming activities and its activities elsewhere. The authority cited by Appellant is not in point. Only those premiums which are collected on Wyoming risks are taxed by Wyoming, and hence the tax imposed is already apportioned. The Wyoming Supreme Court, in considering relevant U.S. Supreme Court decisions, determined that the tax imposed was constitutionally fair. The tax imposed is clearly within the controlling standard, i.e., has the State given anything for which it can ask a return. *General Motors Corp. v. Washington*, 377 U.S. 436, 440-441, 84 S. Ct. 1564, 12 L.Ed.2d 430 (1953); 15 U.S.C.A. 1012, footnote 15. As pointed out by the Supreme Court of Wyoming, it will be, in part, the efforts of this State in reducing those risks that casualty insurance protects against, which will determine the ultimate cost of AFCIA doing business here. It will be the State of Wyoming which must expend its efforts to provide the proper business climate for conducting the business of insurance. (See Jurisdictional Statement, p. A57).

The tax has been fairly apportioned and the constitutional provisons cited by Appellant are inapplicable to the factual situation of this case.

E. APPELLANT MAKES NO LEGALLY OR PHILOSOPHICALLY COGNIZABLE ARGUMENT WITH RESPECT TO IMPAIRMENT OF CONTRACT.

This argument was not given any consideration by the Wyoming Supreme Court for the reason that the issue was not properly briefed. This problem persists. Appellant has neither delineated the theory which supports the question he raises, nor has he brought forward any authority to support it.

However, it is clear from the record that a request to cancel the policy of Lt. Col. Aparicio was made and the request was complied with. No facts have been brought forward which contradict this view. There is absolutely no basis in fact or in law which indicates that this question is so substantial as to require plenary consideration by this Court.

III.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED

In order to invoke the jurisdiction of the U.S. Supreme Court there must be a substantial federal question presented:

> Whether there is such a question in the case is a matter that the Supreme Court must decide for itself. The mere presence of a federal question will not permit review, however, unless that federal question is "substantial." Even though a question as to federal law has been raised, if it appears that the question is wholly formal, or is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by a decision of the Supreme Court so as to leave no room for real controversy, the court will not hear the case.
>
> Wright, *Law of Federal Courts*, Ch. 12, §107, pp. 485-486 (1970).

It is also required that the federal question be raised in a proper manner in the State courts. *Id.*, at p. 486.

As to each of the issues raised by AFCIA, the Appellee contends:

(A) The states are so clearly vested with authority to regulate insurance that any question with respect to the powers of a state to regulate an insurance company, AFCIA included, is explicitly foreclosed by prior U.S. Supreme Court decisions. There is no real controversy. (See argument II-A, *supra.*)

(B) The regulation and taxation undertaken by the State of Wyoming with respect to AFCIA is clearly within the guidelines set down by prior U.S. Supreme Court decisions. Here again, a decision contrary to that of the Wyoming Supreme Court is explicitly foreclosed by prior U.S. Supreme Court decision (See Argument II-B, *supra*).

(C) AFCIA is clearly not a federal enclave or a federal instrumentality. No other conclusion can be reached in that regard. This question is devoid of merit and is frivolous and is explicitly foreclosed by prior U.S. Supreme Court decisions (See Argument II-C, *supra*).

(D) The Wyoming tax is apportioned and is clearly within the realm of constitutional fairness and there is no substantial question in view of prior U.S. Supreme Court decisions (See Argument II-D, *supra*).

(E) As to the impairment of contract issue, the record is clear that the question is devoid of merit and is frivolous. This question, moreover, was not properly raised in the state court in that Appellant failed to support his claim by proper briefing and argument (See Argument II-E, *supra*).

IV.

THERE IS AN ADEQUATE STATE BASIS FOR ONE OF THE QUESTIONS AT ISSUE HERE

The most important limitation on U.S. Supreme Court review is that the Court will not review judgments of state courts that rest on adequate and independent state grounds. Wright, *Law of Federal Courts*, *supra*, Ch. 12, §107, pp. 487-488. Even where the issue is decided on precedural grounds, which results in no consideration being given the merits of the federal question, the Court will decline review if the procedural rule serves a legitimate state interest. *Id*, p. 490.

As to the issue of impairment of contractual rights, treated as question "E" in the preceding two arguments, there is an adequate state ground for disposition in that there is a legitimate state interest in preserving proper and orderly appellate procedure. The failure of a party to support an assertion of error with pertinent authority and cogent argument is treated as fatal to consideration of the question by virtually all appellate courts. The interest at stake is, of course, the delineation of a case or controversy. Moreover, without such authority and argument, the burden would be placed on the appellate court to do the research and determine the perimeters of the question presented. This would place an onus on the appellate court and leave the adverse party in limbo as to the exact nature of the question presented.

There exists an adequate state ground for decision of this issue. Even in the presence of a federal question, which Appellate has failed to delineate, this assertion of error should be dismissed.

V.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as to not need further argument. Moreover, no substantial federal question is presented in any of the issues raised. Finally, as to the issue of impairment of contract, there exists an adequate state basis irrespective of any federal questions.

Appellee respectfully moves the court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Wyoming.

Respectfully submitted,

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No. 80-1945

In the Supreme Court of the United States

October Term, 1980

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
Appellant,

VS.

DEPARTMENT OF INSURANCE, STATE OF WYOMING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

APPELLANT'S REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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I

APPELLEE'S MOTION FAILS TO DEMONSTRATE THAT THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL

Appellee in its Motion to Dismiss or Affirm has presented the issues in a different order from that in Appellant's Jurisdictional Statement and for convenience of the Court appropriate cross-references are herein made to such motion.

First (Federal Enclave Questions):

Appellee Wholly Fails to Controvert AFCIA's Contention That Its Operation on a Federal Enclave Provides It Immunity From State Taxation and Regulation.

This, Appellant's first point (pages 10 to 15 of Jurisdictional Statement, is not controverted or addressed by Appellee except to say incorrectly that AFCIA contends *itself to be a federal enclave!* (Page 6 of Appellee's Motion.) The Court below likewise sidestepped this point by adverting to other points, as mentioned on pages 12, 13, Jurisdictional Statement. Neither Appellee nor the Court below has confronted and addressed Appellant's first point and issue that its operation on a federal enclave provides it immunity from state taxation and regulation (wholly irrespective of its federal instrumentality status).

For a state to authorize and direct its officials to go onto a federal enclave and there undertake the massive and intensive investigation and supervision of an officially recognized non-profit military association as contemplated by Appellee under purported statutory authority (W.S. 26-2-116, 118, 119, 122) and as outlined in the NAIC Examiner's Handbook (pages A129 to A134, Jurisdictional

Statement), to tax Appellant and to require that it employ Wyoming licensed agents (W.S. 26-3-130) violate basic federal constitutional rights and provisions heretofore cited under "Questions Presented" 1 through 5, on pages I and II, of Appellant's Jurisdictional Statement. This point has not been answered because what the state seeks to do is without precedent or support. Appellee overlooks its obligation to accord the Kansas Cession Act full faith and credit. Questions Presented Nos. 1 through 5 under this point are substantial federal questions requiring plenary consideration. (Attention is here called to full citation now available, 5 Kan. App. 787, 625 P.2d 11 (1981) of *In the Matter of Armed Forces Cooperative Insuring Association from a Decision of the Board of Tax Appeals, State of Kansas* cited on page 11, Jurisdictional Statement.)

Second (Federal Instrumentality Question):

Appellant's Federal Instrumentality Status Is Not Dependent on Its Creation by Federal Statute or Regulation. (Replying to Point C, pp. 5, 6 of Appellee's Motion)

Appellee under "C" contends on pages 5, 6 that "a federal instrumentality must be created by federal statutes or federal regulations", citing four cases which involve federal statutes or regulations but do not hold that such are required: (1) In *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 316) 429, 4 L.Ed. 579 (1819), the Bank of the United States was incorporated by Act of Congress of 10th April 1816, c. 44. AFCIA, of course, is not incorporated and *McCulloch v. Maryland* did not consider applicability of the new federal instrument doctrine to unincorporated associations but its broad delineation of federal "Means" and "Instruments" certainly includes AFCIA. (2) *Johnson v. State of Maryland*, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed.

126 (1920) held that a postal employee was immune from state prosecution for driving without a state driver's license, yet pointed to no specific federal statute or postal regulation making him a federal instrument but to the contrary held: "It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed" (41 S.Ct. at 17). Thus, Johnson was presumed to have been appointed a postman by general authority of the post office just as in the instant case the Department of Defense must be presumed to have acted within its general authority in appointing and designating AFCIA an officially recognized non-profit military association and the Army must be presumed duly authorized in providing real estate for its offices and operations and supervisory senior officers to manage and regulate AFCIA at Fort Leavenworth. No Act of Congress or federal regulation specifically designating Johnson a federal instrument was required to give him such status, and neither is such required for AFCIA. It is the substance that creates this relationship with the United States not the precise mode followed. (3) *Department of Employment v. United States*, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed. 2d 414 (1966), held the American Red Cross to be a federal instrumentality immune from state taxation and "that this immunity has not been waived by congressional enactment" (87 S.Ct. at 467). Chartered by an Act of Congress, the American Red Cross is supervised by federal officers as is AFCIA, but nowhere is it held that such incorporation is a requirement. (4) Finally, *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942) held unincorporated post exchanges to be federal instrumentalities and that their establishment and control "in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force

of law." 62 S.Ct. 1169-1170. Likewise the operations of AFCIA on Army property under supervision by senior military officers stationed there are authorized in writing by the Commandant whose word has the force of law and whose authority is unchallenged by Appellee. Specific statutory or regulatory directions are not required because presumably the Commandant operated within the authority granted him by military regulations of general scope. Such authority is unchallenged herein. If individuals can become federal instruments under general appointive authority so may AFCIA in the manner herein followed. Article VI, Clause 2 of the Constitution does not require more to establish federal supremacy.

Appellant has never contended AFCIA *is* a federal enclave but under a separate independent point has contended it is located and operated *on* a federal enclave. (See pp. 10 to 15 of its Jurisdictional Statement.) Appellee improperly interjects such an incorrect statement of Appellant's contention in controverting its federal instrumentality point, thereby setting up a straw point to knock down. Obviously a federal enclave is a territorial *place* whereas AFCIA is a military related *activity* authorized by the federal government to take place there.

Third (Mail Order Point):

Appellee Overlooks This Court's Prior Mail Order Decisions Granting State Tax and Regulation Immunity to Non-Residents Having No In-State Property, Office or Agents. (Replying to Point B, pp. 4, 5 of Appellee's Motion)

Passing onto the third point urged by Appellant's Jurisdictional Statement, pp. 18-21, that even if *in personam* jurisdiction were present, the state court nevertheless was powerless to regulate and tax a non-resident mail

order seller having no office, property or agents within the state, Appellee (pp. 4, 5 of motion under point B) and the court below simply ignore the repeated holdings of this Court cited on page 20 of the Jurisdictional Statement that advertising, telephoning and deliveries to resident customers do not give rise to an in-state presence such as to subject the non-resident seller to regulation and tax. As recently as 1977 this Court has recognized the sharp distinction between mail order sellers having in-state retail outlets, solicitors or property and those like National Bellas Hess who do not. *National Geographic Society v. Board of Equalization*, 430 U.S. 559, 560 note 6, 97 S.Ct. 1386, 51 L.Ed.2d 631. The basic rule enunciated in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), approved in *National Geographic* is still controlling law which would require overturning for affirmance herein:

> "In order to uphold the power of Illinois to impose tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors or property within a state, and those who do no more than communicate with customers in the state by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been recognized by the state taxing authorities, is a valid one and we decline to obliterate it." (87 S.Ct. 1392).

We have previously called attention to this Court's holding that with respect to the McCarran-Ferguson Act it was "not the intention of Congress in the enactment of this legislation to clothe the state with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern

Underwriters Association Case." *State Board of Insurance v. Todd Shipyards,* 370 U.S. 451, 82 S.Ct. 1380, 1383, 8 L.Ed.2d 60 (1962).

Therefore the questions of violation of due process and the commerce clause are substantial in that this Court would have to reconsider and obliterate its repeated decisions above mentioned in order to sustain Appellee's motion.

Fourth (Failure to Apportion Tax):

Appellee Misperceives Appellant's Fourth Point on Failure to Apportion Premium Tax. (Replying to Point D, p. 7 of Appellee's Motion)

Appellee, on p. 7 under "D", wholly misperceives Appellant's point on non-apportionment of the tax. We do not contend that Appellee seeks to tax coverage on AFCIA's members not stationed in Wyoming. To the extent it does not do so there is of course what the District Court termed "apportionment of a sort". (A66). But this is not the sort of apportionment required. The full Wyoming tax is imposed on a policy issued to a Wyoming stationed member despite the fact that the entire effort to produce the business and write the policy is done outside Wyoming at Fort Leavenworth, and if Wyoming is permitted to impose an unapportioned single factor tax thereon so could Kansas. This question is therefore substantial.

Fifth (Impairment of Contract):

Appellant's Contended Impairment of Contract Is Worthy of Consideration by This Court. (Replying to Point E, p. 7 of Appellee's Motion)

Despite criticism of the court below that Appellant "has not presented us authority or cogent argument for

the proposition", Appellant in fact presented constitutional and U.S. Supreme Court authority in support of its contention of impairment of contract. If the Court below disagreed with such authority or deemed it to be insufficient such is no reason for this Court not to take cognizance of such a basic important point. Otherwise the Court below by regarding authority cited as insufficient to sustain a contention could by disregarding it make it impossible for a litigant to be heard before this Court. Appellant has been denied due process and asks to be heard.

Sixth (Personal Jurisdiction):

The Question of in Personam Jurisdiction Is Substantial. (Replying to Point A, pp. 3-4 of Appellee's Motion)

Appellee under its Point A has chosen to address itself to a question not emphasized in Appellant's Jurisdictional Statement but nevertheless preserved under Questions Presented and cites four of this Court's decisions as supporting *in personam* jurisdiction. Appellant did not argue this question of violation of due process therein because it obviously becomes moot if the state does not have constitutional power to regulate and tax a mail order insurer under the circumstances presented, the substantial presence required therefore being much greater than minimum contacts required for personal jurisdiction. Even so, the four cases cited by Appellee (pp. 3, 4 Appellee's Motion) fail to support its motion: (1) *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), held there was no *in personam* jurisdiction because defendant had no office and transacted no business within the state (78 S.Ct. at 1238). Neither does AFCIA in Wyoming. (2) *International Shoe Company v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945) held there

was *in personam* jurisdiction because defendant employed from 11 to 13 salesmen within the state who solicited orders and displayed samples, none of which was present in Wyoming. AFCIA has none in Wyoming. (3) *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 233 (1957), was an action by a California beneficiary on a life policy on a California insured mailed to insured in California who paid premiums by mail from California. *In personam* jursdiction by mail service was upheld. But the instant case was not brought by a party to a policy seeking its enforcement but by the state to enforce regulation and taxation. Required minimum contacts are dependent on relationships between litigating parties. (4) Finally, *Travelers Health Association v. Virginia*, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154 (1950) arose under the state blue sky laws, long since amended to exclude insurance policies and hence this decision loses persuasiveness. We agree that the question of *in personam* is worthy of consideration but did not emphasize it for the reason hereinabove mentioned. In this connection *Hanson v. Denckla*, supra, at p. 1239-1240 of 78 S.Ct. made it clear that the minimum contacts required for a non-resident to be amenable to *in personam* jurisdiction may not comprise "the unilateral activity of those who claim some relationship with a nonresident defendant", (such as activities of AFCIA's insureds in mailing their premium checks, obtaining data from firemen or police to substantiate their proofs of claim and possibly instituting suits in the state courts). All such services are paid out of taxes imposed on insureds and such unilateral activities "cannot satisfy the requirement of contact with the forum state" on the part of AFCIA. See also cases cited on page 21 of Jurisdictional Statement.

II

THE FEDERAL QUESTIONS RAISED BY APPELLANT ARE INDEED SUBSTANTIAL

A review of "Questions Presented" by the Jurisdictional Statement indicates basic, substantial and important federal questions. (1) The assertion by a state of the right to send its officials onto a federal enclave, inspect, examine and supervise activities there of senior military officers duly designated to carry on a non-profit insurance activity as a fringe benefit for military personnel throughout the world is as startling as it is novel, to say nothing of the state's regulation and taxation thereof and statutory requirement of Wyoming licensed agents to countersign policies. W.S. 26-3-130. (2) The only objection made to AFCIA's status as a federal means or instrument that it was not incorporated by an Act of Congress or a specific regulation raises a basic question: are lawful acts of the Department of Defense and its major components in appointing AFCIA as an officially recognized non-profit military association together with their bestowal of substantial monetary benefits including real estate for office use, and the efforts of senior military officers to manage AFCIA sufficient authorization? (3) Assertion by a state of right to tax and regulate a non-resident mail order activity having no office, property or agents within that state contravenes recent decisions of this Court prohibiting such as violative of due process and the commerce clause. (4) May a state impose an unapportioned single factor premium tax heretofore struck down in Wisconsin for failing to take into account the fact that almost if not all the effort to produce the insurance contracts was done outside Wyoming? (5) Does a state's request as distinguished from a formal order to cancel a contract before hearing constitute unconstitutional impairment of contract?

Indeed each federal question so presented is substantial and in the aggregate they merit plenary consideration by this Court in order to protect AFCIA and more than 88,000 members of AFCIA from being denied fundamental rights by unconstitutional state action. The constitutional provisions violated are cited under Questions Presented on pages I, II of Appellant's Jurisdictional Statement. This Court's constitutional interpretations of long-standing should not be obliterated by the state courts as was done below and any reconsideration of their current effect and meaning merits plenary treatment herein.

III

CONCLUSION

For the reasons given, Appellant submits that substantial federal questions and violations of federal constitutional provisions cited under Questions Presented in the Jurisdictional Statement upon which this cause depends merit plenary consideration by this Court.

Respectfully submitted,

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No. 80-1945

In the Supreme Court of the United States

OCTOBER TERM, 1981

ARMED FORCES COOPERATIVE INSURING ASSOCIATION,
APPELLANT

v.

DEPARTMENT OF INSURANCE, STATE OF WYOMING

ON APPEAL FROM THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether appellant is an instrumentality of the United States, so as to be immune from the regulatory and taxing provisions of the Wyoming Insurance Code under Article VI (the Supremacy Clause) of the United States Constitution.

2. Whether the application of the Wyoming Insurance Code to appellant's issuance of insurance policies to Wyoming residents on risks located in Wyoming, and the collection of premiums from these policyholders, impinges upon the authority granted to the United States by Article I and Article IV of the Constitution, on the ground that appellant conducts its operations solely from Fort Leavenworth, a federal enclave over which the United States has exclusive jurisdiction.

3. Whether the application of the Wyoming Insurance Code to appellant's issuance of insurance policies and collection of premiums on risks located in Wyoming violates the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.

4. Whether Wyoming's exercise of in personam jurisdiction over appellant violates the Due Process Clause of the Fourteenth Amendment.

5. Whether the Wyoming Insurance Code's failure to apportion the gross premium tax between appellant's activities at Fort Leavenworth and its transactions in Wyoming violates the Due Process Clause of the Fourteenth Amendment.

6. Whether appellant's cancellation of its contract of insurance with Lt. Col. Aparicio at appellee's request was an unconstitutional impairment of contract under Article I, Section 10 of the Constitution.

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ARMED FORCES COOPERATIVE INSURING ASSOCIATION, APPELLANT

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DEPARTMENT OF INSURANCE, STATE OF WYOMING

ON APPEAL FROM THE SUPREME COURT OF WYOMING

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The findings of fact, conclusions of law, decision and order of the Wyoming Commissioner of Insurance (J.S. App. A68-A103) and the decision letter of the District Court of Laramie County of Wyoming (J.S. App. A64-A67) are not officially reported. The opinion of the Supreme Court of Wyoming (J.S. App. A1-A61) is reported at 622 P.2d 1318.

JURISDICTION

The judgment of the Supreme Court of Wyoming was entered on December 31, 1980. An order denying appellant's petition for rehearing was filed on February 19, 1981 (J.S. App. A104). The notice of appeal to this Court was filed on March 17, 1981 (J.S. App. A107-A108), and the jurisdictional statement was filed on May 18, 1981. The Supreme Court of Wyoming held in favor of the validity of state statutes, the validity of which was drawn in question on the ground of repugnance to the Constitution of the United States. Accordingly, the jurisdiction of this Court is conferred by 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of Articles I, IV, and VI and the Fourteenth Amendment to the United States Constitution, and the relevant portions of the Wyoming Insurance Code are set forth in J.S. App. A110-A112, A115-A128, and A135-A136. The relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. 1011-1013, are set forth in the Appendix, *infra*, 1a-2a.

STATEMENT

1. This is an appeal from a judgment of the Supreme Court of Wyoming (J.S. App. A105) affirming a district court judgment (J.S. App. A62) that affirmed an order of the Insurance Commissioner of Wyoming (J.S. App. A68). That order: (1) assessed a $5,000 civil penalty against appellant; (2) required that a 2.5% tax on insurance premiums collected by appellant on Wyoming risks during 1975 be computed

and paid; and (3) required that appellant cease and desist from further transacting insurance business in Wyoming, including the collection of insurance premiums on policies insuring risks located in Wyoming until it has secured a certificate of authority from the Wyoming Department of Insurance (J.S. App. A102-A103).

Appellant, an unincorporated non-profit military association organized in 1877, is a property and casualty insurer providing insurance coverage to eligible members of the armed forces. From its organization, appellant has maintained its only offices and employees on property owned by the United States as the United States military reservation at Fort Leavenworth, Kansas, a federal enclave over which the United States has exclusive jurisdiction.[1] Appellant's membership comprises approximately 88,000 active and retired warrant and commissioned officers in the armed services of the United States. Appellant is designated by both the Department of the Army and the Department of the Navy, and is recognized by the

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[1] Pursuant to the 1875 Kan. Sess. Laws, ch. 66, § 1 (reenacted as Kan. Stat. Ann. §§ 27-101 to 27-104 (1973)) (J.S. App. A113-A114), the State of Kansas ceded exclusive jurisdiction of the Fort Leavenworth Military Reservation to the United States, reserving the right to serve criminal and civil process thereon and to tax the property and franchises of any railroad, bridge, or other corporation within the boundaries of such lands. See *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525 (1885); *Benson* v. *United States*, 146 U.S. 325 (1892). Kansas reserved neither the right to control or to regulate business on this reservation (*Murphy* v. *Love*, 249 F.2d 783 (10th Cir. 1957)) nor the right to tax the appellant (*In re Armed Forces Cooperative Insuring Association*, 5 Kan. App. 2d 787, 625 P.2d 11 (1981)). At no time has the Kansas Insurance Commissioner sought to regulate appellant.

Department of Defense, as a non-profit military association (J.S. App. A6, A70-A71, A73).

Appellant is governed by an executive committee of five members, who are senior officers on active duty at Fort Leavenworth. Although these officers are elected by appellant's membership, they must obtain written approval of this activity from the Commanding General at Fort Leavenworth, and they serve on the executive committee at his pleasure.[2] The casualty insurance coverage on personal and real property issued by appellant is available to its members and to military personnel in the three highest enlisted grades, although these latter are not eligible for membership. Applications for membership and applications for insurance are made to appellant at Fort Leavenworth by mail, telephone, or personal visit, and require approval at a meeting of the executive committee. No salesmen or agents are employed by appellant and no commissions are paid by it to anyone. Appellant advertises the availability of its insurance, however, in the Army Times, the Air Force Times, and the Navy Times. Its members are encouraged to solicit new members.[3] All insurance contracts of the Association are prepared at Fort Leavenworth (J.S. App. A7, A52).

Appellant has never maintained any office, property, employee, representative, agent, telephone, post of-

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[2] We are informed that the requirement of approval by the Commanding General has no particular reference to appellant. Rather, it relates to any unofficial activity in which subordinate officers of the commander participate.

[3] Indeed, at least one non-commissioned Air Force officer stationed in Wyoming testified that he purchased a policy from appellant after being encouraged to call appellant's toll-free number by a fellow sergeant (J.S. App. A52).

fice box or address within the State of Wyoming or within the civil court jurisdiction and boundaries of any other state. Certain Wyoming residents subscribe to the above-mentioned periodicals in which appellant advertises. As of the date of the Insurance Commissioner's order, there were 99 Wyoming residents who insured their property with appellant. Of these, 84 had been insured with appellant prior to moving to Wyoming. Of the 15 persons who had established residence in Wyoming prior to becoming insured by appellant, three resided on the Warren Air Force Base in Cheyenne. In 1976, the total premium volume from appellant's ninety-nine policy holders in Wyoming was $11,005.70. Some requests for insurance and premium payments were mailed from Wyoming to appellant's office. All claims that may be allowed to Wyoming insureds are paid by appellant to their accounts at the Army National Bank at Fort Leavenworth, subject to withdrawal according to the pleasure and direction of the respective claimants. If there is a dispute as to a claim, the insured may designate an advisory board of three members of appellant to examine the validity of the claim, or may obtain statements from local police or firemen who may have investigated the loss, or from other disinterested witnesses, or may obtain the services of a professional adjuster at appellant's expense. Any disputes are finally reviewed and decided upon by appellant's staff and its Executive Committee at Fort Leavenworth (J.S. App. A7-A8, A52, A74-A75).

Appellant is not currently transacting new business with respect to residents and risks located in Wyoming, but it does continue collecting premiums on and servicing such Wyoming policies as remained in force at the time this action was brought (J.S. App. A8).

Appellant does not now have, nor has it ever had, a certificate of authority to transact insurance business in Wyoming. Moreover, appellant has never filed an annual report with or paid the annual premium tax to the appropriate Wyoming authorities. It is, however, willing to file its annual report voluntarily with the Wyoming Insurance Department if so requested (J.S. App. A8).

2. To transact insurance business in Wyoming, a person is required to have a certificate of authority from the Wyoming Insurance Commissioner (Wyo. Stat. §§ 26-1-111, 26-3-105 (1977); J.S. App. A115, A122-A123).[4] In addition, an authorized insurer may make a contract of insurance upon property or risks located in Wyoming only through a duly appointed and licensed resident of the state, who must be paid a minimum commission as specified by Wyo. Stat. § 26-3-130 (1977) (J.S. App. A126). Pursuant to Wyo. Stat. § 26-4-103 (1977) (J.S. App. A127-A128), each authorized insurer must file an annual report with the Wyoming Insurance Commissioner showing, *inter alia*, total direct premium income and other consideration for the insurance contracts covering property or risks located in Wyoming, and pay an annual tax of 2.5% upon net premiums and net consideration.

In August 1976, Lt. Col. Arthur Aparicio inquired of the Wyoming Insurance Department concerning appellant's status in Wyoming. Aparicio had recently purchased a new home in Cheyenne. He was in-

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[4] "Transacting insurance" includes solicitation or inducement, negotiations, effectuation of a contract of insurance, and transactions of matters subsequent to effectuation and arising out of such a contract (Wyo. Stat. § 26-1-110 (1977); J.S. App. A115).

formed by an Assistant Commissioner in the Wyoming Insurance Department that appellant had no certificate of authority to transact insurance in Wyoming and thus could not provide coverage for his property in Wyoming. Previously, Aparicio had obtained from appellant a policy of insurance on his home. Shortly thereafter, a representative of the mortgagee on Aparicio's new home inquired of the same Assistant Commissioner whether Aparicio's home was properly insured, and was told that unless appellant was a licensed insurer in Wyoming, it could not legally cover the property risk of a Wyoming resident. The Assistant Commissioner thereafter called a representative of appellant and advised appellant to cancel Aparicio's policy, and to refund the premium. Appellant complied with the request under protest, and without prejudice to contesting such action (J.S. App. A5, A71).

An administrative complaint was filed against appellant on September 15, 1976, alleging that it was transacting insurance business in Wyoming without a certificate of authority and without payment of the premium tax. Service of the complaint was made by mail upon appellant at Fort Leavenworth (J.S. App. A2-A4, A71-A72). Appellant entered a special appearance to contest the in personam jurisdiction alleged over it, and the applicability of the Wyoming Insurance Code to it on the grounds, *inter alia*, that it was exempt from Wyoming's tax and regulation under the Supremacy Clause of the Constitution as a federal instrumentality and that the imposed tax and regulation violated the Due Process and Commerce Clauses. The Wyoming Insurance Commissioner either rejected or failed to pass upon appellant's constitutional objections. Moreover, the Wyoming Insurance Commissioner assessed a $5,000 penalty against

appellant (see Wyo. Stat. § 26-1-115(b) (1977); J.S. App. A135) and ordered, *inter alia*, appellant to pay the 2.5% premium tax on its policies insuring risks located in Wyoming and to cease and desist from further transaction of insurance in Wyoming until it had complied with Wyoming insurance law (J.S. App. A68-A103). Appellant thereupon brought this suit in the District Court for the First Judicial District of Wyoming. The district court affirmed the State Insurance Commissioner's order (J.S. App. A62-A63, A64-A67). The Supreme Court of Wyoming affirmed (J.S. App. A1-A61).

ARGUMENT

The decision of the Supreme Court of Wyoming is correct and this case does not present any questions warranting plenary review.

1. The decision below properly concluded (J.S. App. A32-A37) that appellant is not a federal instrumentality entitled to immunity from state taxation and regulation under Article VI (the Supremacy Clause) of the Constitution. If appellant were an instrumentality of the federal government, the State of Wyoming would have no power to tax or regulate the insurance policies issued by appellant to Wyoming residents on Wyoming risks. See, *e.g.*, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *United States V. Mississippi Tax Commission*, 421 U.S. 599, 612-613 (1975); *Department of Employment* v. *United States*, 385 U.S. 355 (1966); *Mayo* v. *United States*, 319 U.S. 441, 445, 448 (1943); *Johnson* v. *Maryland*, 254 U.S. 51 (1920).

This Court has recognized that there is no simple test for determining whether an institution is so closely related to a governmental activity as to become a tax-immune instrumentality of the United

States. (*Department of Employment* v. *United States, supra*, 385 U.S. at 358-359; see also *First Agricultural National Bank of Berkshire County* v. *State Tax Commission*, 392 U.S. 339, 353-354 (1968) (Marshall, J. dissenting)). Nevertheless, the first inquiry has always been the statute or regulation authorizing the institution (*Department of Employment* v. *United States, supra*, 385 U.S. at 359; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483-484 (1942)). Without some statutory or regulatory authorization, there is no basis for concluding that an institution is a federal instrumentality. Cf. *Kalinski* v. *Commissioner*, 528 F.2d 969 (1st Cir. 1976).

Here, there is no statutory or regulatory basis for appellant's claim that it is a federal instrumentality. Appellant argues that it is a federal instrumentality because the Departments of Defense, Army and Navy recognize it as a nonprofit military association, that it has been permitted to conduct its activities on the federal enclave in valuable real estate for a token rent, and that the military command permits the five officers elected as its governing board by its members to act in that capacity. But none of these actions makes appellant a federal instrumentality; it is simply a voluntary association of individuals acting for their mutual benefit. That those individuals are active or retired members of the armed forces does not endow appellant with the attributes of a governmental instrumentality. To the contrary, it falls within the definition of a private organization on Department of Defense installations under 32 C.F.R. 212.7(c),[5] or of a private organization on Department of Army

[5] A private organization is defined in 32 C.F.R. 212.7(c) as "[a] generally self-sustaining, non-Federal entity, incorporated or not, and constituted or established and operated on a DoD installation, with the written consent of the installation com-

installations under AR 210-1(3)(c) (1974). Both of those regulations specifically provide that such private organizations are not instrumentalities of the military department.[6]

2. As the court below held (J.S. App. A28-A29), there is likewise no basis for appellant's further argument (J.S. 10-15) that it is not subject to Wyoming tax or regulation because its offices and employees are located on a federal enclave subject to the exclusive jurisdiction of the United States. In view of the federal government's exclusive jurisdiction over Fort Leavenworth, on which appellant has its offices and employees, Wyoming can exercise no jurisdiction over appellant with respect to its activities on the federal enclave. See *Humble Pipe Line Co.* v. *Waggoner*, 376 U.S 369, 371 (1964), and the cases cited at J.S. 10. But the State of Wyoming does not seek to regulate and tax appellant for what it does on the federal enclave or elsewhere outside of the State of Wyoming. Instead, Wyoming seeks to have appellant conform to Wyoming laws with respect to insurance policies held by residents of Wyoming on risks to real and personal property located in Wyo-

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mander or higher authority, by individuals acting exclusively outside the scope of any official capacity as officers, employees, or agents of the Federal Government." A similar definition is set forth in AR 210-1(3)(c).

[6] In *Standard Oil Co.* v. *Johnson, supra,* in *United States* v. *Mississippi Tax Commission, supra,* and in *Champaign-Urbana News Agency, Inc.* v. *J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980), post exchanges, commissaries and/or officers' clubs were found to be instrumentalities of the federal government. But these organizations are not comparable to appellant because they were established by specific regulations. Indeed, the military exercises far more extensive control over these institutions than over appellant or those other private organizations mentioned in 32 C.F.R. 212 or in AR 210-1.

ming. Indeed, the Court's decision in *Robertson* v. *California*, 328 U.S. 440 (1946), provides a complete answer to appellant's arguments.[7] That case involved a prosecution for violation of California insurance law by acting on behalf of a nonadmitted Arizona mutual insurance company. The Court stated (*id.* at 461):

> [T]he only objection advanced which is independent of commerce clause considerations is that to sustain the state's requirements, particularly in so far as they exclude the Society from interstate operations in California and thus also appellant's activities in aid of its business, will be in effect to project California's laws into other states, here

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[7] The cases upon which appellant relies (J.S. 14) are distinguishable. *Oil, Chemical & Atomic Workers* v. *Mobil Oil Corp.*, 426 U.S. 407 (1976), involved the application of the Texas right-to-work laws to seamen, whose job situs is on the high seas, but who have significant contacts with Texas. The Court held that the job situs controlled the applicability of the particular labor law. In *Vincent* v. *General Dynamics Corp.*, 427 F. Supp. 786 (N.D. Tex. 1977), the court was faced with applying the appropriate labor law where facilities were partly within Texas and partly within a federal enclave where the Texas right-to-work laws did not apply. Following *Oil, Chemical*, the district court held that because most of the job situs was in the federal enclave and the job situs was not divisible, the policy of practicality that governs interpretations of federal labor laws precluded the application of the Texas right-to-work laws to any part of the job situs. These federal labor policies have no application here. Finally, *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934), merely stands for the proposition that California could not require a local distributor to pay California tax on gasoline sold in a federal enclave subject to the exclusive jurisdiction of the federal government. See *Sollitt & Sons Construction Co.* v. *Commonwealth*, 161 Va. 854, 172 S.E. 290, appeal dismissed, 292 U.S. 599 (1934), where the court held that the state could levy a tax on a builder whose operations in constructing a post office extended beyond the federal enclave in which the post office was located.

presumably Arizona, and regulate the Society's activities there. The contention is obviously without merit. Nothing which California requires touches or affects anything the Society or appellant may do or wish to do in Arizona or elsewhere than in California. *Hoopeston Co.* v. *Cullen*, [318 U.S. 313 (1943)].

3. The decisions of this Court establish beyond question that a state may protect its citizens and residents by requiring that any company selling them insurance on local risks must first establish its financial responsibility by obtaining a license conditioned upon satisfying standards established by the state, and then by complying with the state's regulations looking further to that end. Thus, amost 80 years ago at the outset of its opinion in *Nutting* v. *Massachusetts*, 183 U.S. 553 (1902), the Court announced that (*id.* at 556): "A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the State may prescribe, not interfering with interstate commerce."

There are accordingly few constraints that the Commerce Clause imposes upon state legislation regulating the sale of insurance, whether by interstate or by local transaction. Even after the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944), and before the McCarran-Ferguson Act, 15 U.S.C. 1011-1013, removed such constraints upon state regulation of insurance as the Commerce Clause might have been thought to impose (*Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946); *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, No. 79-1423 (May 26, 1981)), this Court held that neither the Commerce Clause nor the Fourteenth Amendment pre-

vented a state from prohibiting nonadmitted insurers from selling insurance on local risks to its residents, and from controlling the types and terms of insurance that admitted insurers were permitted to sell. *Robertson* v. *California*, *supra*.[8] More recently, the Court has upheld the power of a state to exclude, or require a license from, an insurance company operating a purely mail order insurance business from another state without agents or employees in the state to whose citizens and residents it sought to sell insurance. *Travelers Health Association* v. *Virginia*, 339 U.S. 643 (1950); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

These decisions establish the power of Wyoming to exclude appellant from selling insurance on Wyoming risks to Wyoming residents until it is licensed, and to condition the issuance of a license upon compliance with the terms of Wyoming's Insurance Code.

4. a. The decisions of this Court are not as clearly controlling in upholding the taxing provisions (Wyo. Stat. § 26-4-103) that impose upon appellant a tax

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[8] The Court had earlier upheld the application of New York law regulating insurance companies to an Illinois cooperative insurance association organized much like the appellant in this case that was seeking to sell casualty insurance from its base in Illinois to New York insureds on New York risks. *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943). The New York statute upheld by the Court required that the Illinois association, although it executed all the contracts of insurance at its headquarters in Illinois, obtain a license conditioned upon submission to New York regulations aimed at protecting the solvency of the association or at promoting the convenience of New York residents in their insurance business. In the absence of a New York license, the association was prohibited from doing any act that affected, aided, or promoted the doing of insurance business in New York. See also *State Farm Insurance Co.* v. *Duel*, 324 U.S. 154 (1945).

upon premiums on policies issued to Wyoming residents upon Wyoming risks as they are in upholding Wyoming's power to regulate appellant's business. Nevertheless, we believe that there is no substantial question as to Wyoming's power to tax appellant's gross premiums earned from policies issued to Wyoming residents.

Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012, removes whatever Commerce Clause constraints that may have existed upon the power of Wyoming to tax, as well as to regulate, the business of insurance. *Prudential Insurance Co.* v. *Benjamin, supra; Western & Southern Life Insurance Co.* v. *State Board of Equalization, supra.* This Court held, however, in *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), that the McCarran-Ferguson Act did not authorize, and the Due Process Clause of the Fourteenth Amendment prohibited, the State of Texas' imposition of a tax on premiums paid on casualty and liability insurance with respect to property in Texas where all other incidents of the insurance and all transactions regarding it were located or took place outside Texas.*

But the facts of this case are distinguishable from *Todd Shipyards.* Here, the property insured by appellant was located in Wyoming, the insurance was issued to Wyoming residents, the applications and premiums were forwarded from Wyoming, the claims and adjustments originated from Wyoming, and payment was made, if not by check or currency forwarded to Wyoming residents, by bank credits of equal value payable on their order (see page 5,

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* There is no basis for appellant's argument (J.S. 21) that Wyoming was without in personam jurisdiction over it in view of this Court's decisions to the contrary in *Travelers Health Association* v. *Virginia, supra,* and *McGee* v. *International Life Insurance Co., supra.*

supra). In sum, the panoply of contacts between appellant's insurance transactions and the State of Wyoming far exceeded the minimal single contact between the insurance company and the State of Texas in *Todd Shipyards.*[10]

b. Appellant further argues (J.S. 21-23) that the Wyoming tax violates the Due Process Clause because it was not apportioned. It therefore challenges the ruling below (J.S. App. A54-A58) that the tax imposed upon net premiums collected on appellant's policies issued to Wyoming residents on Wyoming risks does not violate the Due Process Clause of the Fourteenth Amendment. But Wyoming has already apportioned its tax on appellant to take into account appellant's non-Wyoming activities by taxing only appellant's Wyoming premiums. All that the Due Process Clause requires is that there be a rational relationship between the income attributable to the

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[10] The Court there stated as follows (370 U.S. at 454-455):

> The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.
>
> The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas.

state and the intrastate values of the enterprise. *Exxon Corp.* v. *Department of Revenue of Wisconsin*, 447 U.S. 207, 219 (1980). Indeed, where a state treats a taxpayer engaged in multi-state commerce as a unitary enterprise for purposes of state income or gross receipts taxation and apportionment is required by the Due Process Clause, this Court has held that the use of a single factor, such as gross sales, to make this apportionment is permitted by the Due Process Clause. *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267 (1978).

Although we agree with the decision below, we recognize that *National Liberty Life Insurance Co.* v. *State*, 62 Wis.2d 347, 365-369, 215 N.W.2d 26, 35-37 (1974), appeal dismissed, 421 U.S. 940, cert. denied, 421 U.S. 946 (1975), appears to support appellant's position on apportionment. The Court in *National Liberty*, however, principally relied on *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553 (1965), where this Court held that apportionment by a single-factor sales formula was not authorized by the District of Columbia Code. Although the Supreme Court of Wisconsin was of the view that this Court would have reached the same result if it addressed the constitutionality of a single-factor sales formula (see 62 Wis.2d at 367-369, 215 N.W.2d at 36-37), the Court subsequently made clear in *Moorman Manufacturing Co.* v. *Bair*, *supra*, 437 U.S. at 275, its *General Motors* decision took no position on the use of a single-factor formula of apportionment under the Due Process Clause of the Fourteenth Amendment. If the Supreme Court of Wisconsin had had the benefit of this Court's later decision in *Moorman Manufacturing Co.* upholding the constitutionality of a single factor gross sales formula, it presumably

would have rendered a decision in accord with the decision below.

5. Finally, there is no merit in appellant's contention (J.S. 25) that the cancellation of its insurance policy with Lt. Col. Aparicio at the Wyoming Insurance Department's request constituted an unconstitutional impairment of contract by Wyoming in violation of Article I, Section 10 of the Constitution. Obviously, if appellant was subject to the laws of Wyoming at the time the contract was issued, the contract was unenforceable if it was issued in violation of those laws. Cf. *Griffin* v. *McCoach*, 313 U.S. 498 (1941).

CONCLUSION

The appeal from the judgment of the Supreme Court of Wyoming should be dismissed for want of a substantial federal question.

Respectfully submitted.

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DECEMBER 1981

APPENDIX

McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq*:

Section 1 [15 U.S.C. 1011]. *Declaration of Policy*

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2 [15 U.S.C. 1012]. *Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948*

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 3 [15 U.S.C. 1013]. *Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation*

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act [15 U.S.C. 41 et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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